2001

Tire King v. Flynn : Brief of Appellant

Utah Supreme Court

Robert Flynn III; appellant pro se.
Keith H. Chiara; attorney for appellee.

IN THE UTAH SUPREME COURT

TIRE KING, INC. APPELLEE/PLAINTIFF

V.

ROBERT FLYNN III APPELLANT/DEFENDANT

On Appeal and Review to The Utah Supreme Court from The Seventh Judicial District Court of Carbon County Judge Bryce Bryner.

BRIEF OF APPELLANT

Counsel of Record
Keith Chiara
CHIARA LAW OFFICES
98 N. 400 E.
Price Ut. 84501
Ph: (435)637-7011

Appellant
Robert Flynn III
1265 N Carbonville Rd.
#24, Price Ut.84501
Cell: (435)650-1639

Under: Ut Code Ann. §78-2-2(3)(j); Ut. R. App. P. 29(b)(15);

NO: 20010172-SC

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Under: Ut Code Ann. §78-2-2(3)(j); Ut. R. App. P. 29(b)(15);

Docket: 000700120

Case: 20010172-SC

TABLE OF CONTENTS

Addendum (As Needed) (*)

Items: #1 - #10 (record)

Items: #A - #I

(*)note: VHS tape of trial and limited transcript requested.

QUESTION

At 9:05 AM 7Sept 00, Whether by omission or not, Courts denial of Appellants witness and Continuance Motion, Under URCP(45)e and, Ut. Jud Code §78-24-5(Def. of Subpoenas), did deny Rights; hearing of Appellants full case*, Under Ut. Const. Art. I, sec 7, given the "Mitigating Circumstances" herein; Finalized in denial of Motion for New Trial : (URCP (59a(1)).

(*)note: Full case defined as 1. Breach of contract, and/or, Deception(fraud) as in Appellants "Affidavit with Answer to The Complaint " (11Feb00)

note "Rights" are defined as : In a timely way of process, to have aider order(Quash timely, or Obey) followed pretrial, under URCP(45); with the/a subpoenas. The "order" of orderly process of the Trial Court. (assuming, the court of origin was on the subpoenas)

Authority: 17Am Jur 2d Contempt §42

TABLE OF AUTHORITIES

(*)note: These are all reproduced into the addendum of Brief

SUMMARY OF CASE

This document clarifies to the Ut. Supreme Court the basic mitigating factors involved in the **"loss"** or a witness, and the denial of a Continuance Motion at 9AM(Pretestimony) that Appellant believes hindered his case being fully heard;

The Mitigating factor is the Appellants own affidavit, filed with his "Answer" to the original complaint 11Feb00 which outlined to the Carbon County Sheriff Dept the facts under which his suspicions existed of deception (maybe fraud) of a deposite, and bill at the Appellees' "company", Tire King, of Price Ut; These allegation via the witness, the owner of Tire King were never in court (testimonies) but the Contract Breach was; The Trial Court may have prematurely decided the the case of Contract breach **(the "what") without hearing mitigating** factors, without addressing, hearing or considering the basic "why" of the breach (the deception going on simultaneously at the "company" on money and the bill);

The Mitigating factors of the **"loss"** of a witness at trial are the contempt of "Orderliness" of process and order both of which the trial court basically forgave(but not in any record) under which discretion of these decision might be reversed.

JURISDICTION OF APPEAL

Appellants timely Notice was filed under Title II4(c) (of Ut. R. App. P.) and ordered to the Supreme Court of UTah on its own motion under Ut. R. App. P § 78-2-2(3)(j);

The original appeal filed, was after Trial Court finality of orders, and the Motion of Continuance within, both part of the motion for New Trial under URCP(59)(a)1 (discretion) timely made and denied; The Final Judgement and ORder was then struck by the Trial Court for these others.

BRIEF SUMMARY

The Appellant acting on his own behalf request the Utah Supreme Court to review this case and the actions of trial and court The Seventh Jud. District Court of carbon County, The Honorable Judge Bryce K Bryner; Wherein other party(&court) were abusing process and subpoenas definiton(witness ANSWER not courts) under §78-24-5/6 Ut Jud. Codes; At 9Am 7 Sept 00; Quash at Trial.

The Trial had one basic day, and optional (day2) for small amount of credits (work incomplete I presume) to Appellant which could not compensate him, under that order that day2, for not hearing the "affidavit" in his answer with his witness(the Tire King owner, and Plainitff) and this brief gives basically the mitigating factors of the (A) loss of the witness, and (B) loss of Appellants motion for Continuance, and, (C) of the breach of contract defense; (D) affidavit for which the witnesses there were not privy to private (owner to Petitioner) agreements.

The factors are the testimonies of the owner because of the fact established in the case and trial, that most agreement details, or contractual elements were "verbal" between owner and Petition -er from May 1999 through Septemeber 1999; The Appellants Notice of Appeal Attachments fairly outline mitigating pretrial events.

STATEMENT OF THE CASE

GENERAL TRIAL OUTCOME

Memorandum Decision for this case was issued 11Oct00 and the **Amended Memorandum decision** issued on 25Oct00 (day2 incl) and monies on the complaint, minus any work not done (if taken in day2 for all Appellants Pleading) awarded to Plainitffs, (23 54.05$); Appellant (Defendant) did not have to pay attorney costs, and his deposite (2500.00$) was included (from the original complaint money asked, or, 4854.05$); The Court did not (apparantly) believe Defendants "11 reasons" given for the breach of contract (or, why Defendant took his car from the lot of Tire King 15Sept99) **or** accept the Defendant: breach of contract, as presented. The "Bill" a subject of great questioning in trial was Ex(2) Addendum # 8h . However the "bill" was unsigned by "Defendant"; Defendant claimed it was incomplete **by** fact of not having a witness, owner of Tire King, the "company", to question about contractual(agreements) detail therein; Whereas, the " Plaintiffs"(Appellee (s))claimed "I approved, each and every item" therein. Trial had two(2) Tire King witnesses (a office manager, and the mechanic(Greg)). Defendant gave his own testimony ((11) reasons why he took the car when he did) . (VHS TAPE ONLY

STATEMENT OF THE CASE

GENERAL MITIGATING FACTOR TO TRIAL

Appellants own discovery document and the Appellees Answer, timely made pretrial, (06Mar00, 27Mar00) contains, along with Appellants own Answer, and affidavit(attached) to the complaint, from 7Feb00, the only other record at trial, & the testimony at trial; Altering this, Appellant believes is the details of those documents when explored under oath, and at the testimony of the owner of Tire King, the "plaintiff " in the action; Transmission sublet, invoice bill, total; (All in Addendum #8)
The purpose therein is to adjust the total "bill" which the case money is entriely built on, which the Appellant did not sign, nor, approve. Extra (1700.00$) is fabricated into this "bill".

From the document of record, the Appellee ("Plainitff") answer to Appellants discovery(above), it was clear to court, but not explored, are verbal agreements with the Tire King owner which along with "Complaint" Answer and "affidavit" get the the breach of contract motive (the "why") which is not in the courts own Memorandum Decision of 11Oct00; Based on amounts from the "bill", deceptions in the breach of contract pleading not heard.

STATEMENT OF THE CASE

GENERAL MITIGATING FACTOR OF THE WITNESS

The Plaintiff was issued (amendable; By adding from face "To appear at own trial" below) but voidable/waivable) writ to make the pleading, in affidavit, filed 24Nov99(Sherrif Dept) to evidence deception on monies(deposite/ bill). (all in the affidavit, Addendum # 9); Petitioner left lot 15Sept99; The subpoenas had court-place, Jurisdiction, trial case# for order; Failure on obtaining sublet shown by invoice (from TRI rebuiler) Addendum # 8c to exist(not given in discovery) is proven by the Tire King, nonaction upon it to finish invoice by 15Sept99 or let Defendant go home; If Memorandum Decision(Addendum #4) were correct(as to breach, and completion work) invoice would be paid and completely document finished(unpaid to Oct 1) then. 10Au99memo(Addend #8a) was an invitation to sublet the trans. work till work done (which it would be 10Aug to 14 Sept; Lied) The "contractual arrangements" if any on these were vague, the subpoenas(witness) .. must produce this Pre 15Sept99 agreement from Tire King to TRI (not an 10Oct99 receipt only) before the court; If none, then how can they make one up illegally after 15Sept99 when Petitioner had gone? (767.23$ involved);)

STATEMENT OF THE CASE

GENERAL MITIGATING FACTOR OF THE WITNESS

Plainitffs (Ex 2, Addendum #8h) the bill has not only the transmission showing , but other unresolved items that can be credited back to Petitioner from the Trial courts analysis of what happeded from May 99 to 15Sept 99; The Trial court said they were goig to be "fair" and the Judge said "he took copious notes" to do so; Owner made and serviced all these items or agreements to Petitioner (verbally):

Transmission: (767.23$ No contractual agreement if work breached by Tire King; No Tri &TK Pre-15Sept99 agreement. (there is an Oct 1 agreement/receipt only)

Labor in May 99 (720.00$ (item (7) from "bill": Taken wrongly May from Deposite $$ (no records)

Item (1) Blazer Repair: (48.00$ Breach(of) warranty adj due(receipts)= 500.00$

Item(11) Labor on Engine: (268.80$ Breach of Warranty (Judge mis spoke the situation in Memorandum Decision.)

Once these conflicting agreements are settled the trial will be truthfull and just.

STATEMENT OF THE CASE

BREACH OF CONTRACT

The question of the Breach: the Trial court as said during its own Memorandum Decision "Removal of car(by Defendant) prevents prevented Plaintiff from completing some minor repairs"; Just the opposite of the contention: In the answer to the complaint: "The Plaintiffs failed to provide all and adequate goods and services (the breach of contracts;

What really happened at Tire King? Aug 15-Sept15No work done. Appellant claims: Transmission work terminated(Sublet)&Instal. Trial established: An unauthorized visit by Tire King to Pet./ The witnesses(Trial): could either not remember, or were unsure or misrepresented the facts;(Money asked for; Claimed:No PAY; (15Aug99); Breach occured; Pet. work terminated)Affidavit.)

If there was no records at Tire King as to dates things were done, and what was done and how much, then how can their words be the ultimate last truth? Discovery of DEfendant (addendum# 8) shows NO records exist (at all); The only one left is the owner himself who coordinated these events, and knew; Verbal agrements as said in the Plaintiff Response "oral agreements existed"; In the document (Addendum # 11) Plaintiff's " Response to Defendant Robert Flynns Memorandum in Support of Motion To Dismisss " is

STATEMENT OF THE CASE

BREACH OF CONTRACT

The words: " ongoing agreements, continuing instruction and agreements, etc ";

Based upon what is known then the whatof the breach depends on records (nonexistent at Tire King apparantly), testimonies of witnesses (owner), or the Defendant; The Defendants testimony ("ll reason"s) were given, but the owner would not come to the court; The event happened (affidavit stmt's Point(1)). VHS TAPE

The "why" of the breach, the misuses of monies, again depends for proofs on records (nonexistent at Tire King apparantly), the testimonies of witnesses (owner who made the agreements, not the workers who did the work as in Trial #1), or the Defendant. The Defendant's "affidavit" represents his testimonies, but the foudantion with the owner testimony is critical, along with the step by step chronology, and the trial of what happened to the deposite monies(from May99, step by step, under oath.)

It should be sufficient to decide this case, apparantly the words of the Plainitff against the words of the Defendant, and the records; there must be some physical records at Tire King or,

STATEMENT OF THE CASE

BREACH OF CONTRACT

the "Bill" as presented in Ex(2) alone is not enough to support a complete decision in favor of the Plaintiffs yet the Trial Court without the owner saw it that way; At least the adjusted amounts from page (9) infra., can be resolved in another trial with all major party contract makers present, fairly;

The case as heard then could potentialy be reversed up to that amounts: 2206.03$, and any work not done from day2 of trial #1, not yet given to Petitioner;

(*)note: from page 8
On the transmission arrangements, separately taken, Breach of Contract can be established : Comparisons of the "3" contracts (the forms available): No contract(taking out) trans; 10Aug99 memo invoice from TRI(13 Aug); Sublet, and the receipt Add. 8f, eg any "agreements" Petitioner wrote to Tire King (Aug 10 99) for sublet options to occur on the transmission have to go both ways ie FLYNN TO TIRE KING, and TIRE KING TO TRI; yet nothing in the period from 3Aug99 to 15Sept99 exists (at least in Discovery) to obligate Flynn to pay Tire King unless Tire King made an offical agreement (Petitioner was never notified of such); Tire King to TRi made after Defendant left is illegal;

STATEMENT OF CASE

DISCOVERY MITIGATING FACTORS

Based on filing, 6Mar00 of discovery by Petitioner, and the Answer 27Mar00 Appellant received:

item: TRI(rebuild) receipt/note
item: requested all sublet, and invoiced agreements from, 2May99 to Oct00;

No invoice or sublet on transmission ever turned over to me or court. Court should have believed(in decision) none exists!

ANALYSIS *:Nonaction on invoice voids sublet by 15SEPT 99: Since the note(# 8c) says "Invoice sent 13Aug" this would help explain the sublet between TRI and Tire King reciprocal to my permission (10 Aug99 note);' However, there was a problem in that Tire King never paid this until after Appellant left on 15Sept99 (paid Oct1); The sublet agreement is that Tire King will then be responsible, install, and warrant, and "pay" the bill, I will pay them when all complete. Owner must be there to explain. If a true sublet existed from Tire King to TRi between Aug10, and Sept15 "it can be explored in Trial #2 " At tha time. if payment made to Tire King and no commitment exists they can keep money(I still owe TRI); The invoice needs to be seen. If its a contract or what? Legally invoice goes to Flynn 15sept

✓ *Nonaction 13Aug--to--15Sept(of any kind proves work over(breach))

STATEMENT OF THE CASE

MOTION FOR CONTINUANCE MITIGATING FACTORS

The limited transcript(Addendum #1) shows that whatever happened at 9:05AM is not officially on the record; The attachment for Petitioners Notice of Appeal shows THE "mitigating" events ie the Appeal's analysis of "error"; Was there any prejudice and how much ? ; Addendum# 6 (P. Motion. for New Trial) defines that the decision of the trial court therein; The "continuance" denied for apparantly 1)time, and 2)maybe cause ignoring mitigating factors..).

Issue time:

The Orderliness of Process(on subpoenas)issued 18Feb00 shows the Respondent(s) failed to respond , at all; time was then a factor in Appellants side because this "waives" objection (under auth. :62Am Jur 2d, §161-163 Addendum#E).

Time was also a factor in that 6-8 months for quash,objection or other corrective process; Attorney said he "did NOT want to help" ; There was information in writ to respond at least in time; Therefore by 6Mar00 (time expires to object at next step) Petitioner had the legal right to expect: compliance .

Issue of Causes:

URCP(45)e requires a just cause. However, attorney represented "plaintiff" (Addeendum#6/#11) at 9AM; to avoid, or not help:

STATEMENT OF THE CASE

MOTION FOR CONTINUANCE MITIGATING FACTORS

Based on the Authorities(Addendum #A)Not all continuaces are in discretion if they affect Due Process; Since by 6Mar99 Appellees nonaction of subpoenas, Appellant can assume:compliance (Addendum E#.§161). Time was the reason(Addendum #5/6) so when the added mitigating factor, contempt of orderliness of process is there, something should have been done by court; Court knew affidavit, pleading(fraud/deception to be heard) existed.

Legally also the appearing is mitigating under all the URCP(45) rules *§162 The subpoenas was good (until 9:05AM by nonaction) & court had power to fix its own document, by party no saying anything(Addendum #C). By *addendum #6) "plaintiff wanted" to avoid helping novice Appellant. Appellant objected first;

(*)
Note: If they had responded(timely) it would be cured or, court order issued eventually(8 months left) helping Appellant; The issue was raised again(New Trial) and denied and the issue fairness in time, is now Due Process; The subpoeans was irreg- in its order, not prohibited however to use(process ie case# , court, etc. in place of literal time; (the word is specify); But the court can disregard. The issue is timeliness (or lack of it) to others by Appellees; Wanton disregard for process to make sure no correction, cure, or court order is made.

LEGAL ARGUEMENT

MITIGATING LEGAL POINT(CONTRACTS)

The minor analysis below shows there were three(A,B,C) contracts at work at various point of the arrangement at Tire King which the Appellant holds were breached; The Trial court did not see or point to these in its Memorandum Decision.

contract(A): All work from May on(15Sept99 Petitioner towed his vehicle home for the breach, and as stated in his "Affidavit"; worry about the deception/fraud option)

contract(B): (? on memo) Memo issued to Tire King 10AUg99; Therein is the owners option to sublet transmission but he must 1)decide in time, and 2) give me something in writing as I gave him. (He never responded) Work totally prematurely terminated a few days after, at the point of the "unauthorized visits" to get money beyond the 2500$ deposite, and to say "that Greg(mech.) had never been paid for work "

contract(C): Ungiven(collateral) Tire King to TRI(rebuiler) or, "sublet" agreements (Trial assumes it exist before 15Sept99. No proof(discovery says it does NOt exist(or, Discovery was lying); Appellant feels "illegally " set into motion Oct 1(after P. was

LEGAL ARGUEMENT

MITIGATING LEGAL POINT (CONTRACTS)

under his assumed breach of agreements.

other party was setting into motion the charges under §76-6-404(felony) on 27Sept99;
(Code: Addendum #J; Letter Addendum # 8g)

ANALYSIS

* Appellants legal position(breach of contract of Trial !, and the added Pleading not heard in Trial 1 is the deception and fraud possibility, under that sublet for the transmission.

Addendum 8f shows that on Oct 1 a supposed "contractal" arrange -ment was paid off; and this obligates Appellant (Defendant) to all problems thereafter, against what a "sublet" is; The invoice in that same reference was apparantly sent 13Aug99, Appellant was expected to pay it, and told by TRI 16, or 17Aug 99. Company Tire King however never said.

(*) note:
The invoice, as well as "sublet" as were all documents of receipt -ed works were request in Appelants "Discovery" (06MAr99 and only the receipt from Oct was given, and no sublet. The owner(and testimony) on all invoices, sublets, bill needed in Trial #2

LEGAL ARGUEMENT

MITIGATING LEGAL POINT(CONTRACTS)

Appellant believes legally the reciprocal TRI invoice is not a contractual agreements, just a receipt

Appellant believes legally that some offical legal Tire King to TRI sublet, contract must be deliver to court, or else the memo from 10Aug99 cant be honored, its too late (Defendant left on 15Sept99, and if nothing was given over to complete this memo. its not enforcible; Defendant wants a sublet while he is there at Tire King, and can take advantages of its terms etc., to get all work done by Tire King, checked out mechanically, and paid by Tire King; If Defendant pays what proof is there that Tire King(given the animosities existing now) will be obligated in any legally to pay TRI for work. (They would say FLYNN took his car over there, made arrangements, and we just put it in) They cant have it both ways.

SUMMARY CONTRACTS.

Legally Tire King should have immediately turned over the invoice either paid(copy of) or not to Defendant when they got it. To keep it, not give it over even in discovery is unfair.

LEGAL ARGUEMENT

DUE PROCESS

Under: Art(I) sec 7, of the Ut. Constitution, a right to a fair and complete hearing of ones case must be given before money of the party can be taken; Herein the complete affidavit.

The Appellant believes that (using Authority: 5Am Jur 2d, ex. §782, §783 Appeal and Error) sufficient "discretionary" room existed at all major turning points of this Trial #1 ie from the situation witness and subpoenas, to "bend" (not conform to aider, or URCP(45) in any level); holding this subpoenas beyond reasonable "next just step" (waiver option), and not quashing when plenty of time existed to do so before trial (Under URCP(45) this must be "timely ")); and **"appearing"** (making the court respond and adjudicate in one moment(no record kept))* to prevent "help" to the novice, pro se "Defendant", takes too much advantage of the situation to be fair ; Later finalized.

Referring to Addendum #A:
While the original Motion for Continuance, 9AM 7 Sept 00 was in the discretion of the Trial Court (could be 50-50 if the roles of contempt of order were included); after, in The Motion for New Trial (based on §273 Am Jur 2d) maybe mandatory to grant to hear the full pleadings, and consider the contempt.

CONCLUSION

Appellant believes that substantial loss of his case heard did occur in this Trial #1 that unwarranted omission in the right to have his Continuace (under URCP(4) just cause) against the Contempt of Orderliness of process under URCP(45)(e) and that legally any of these omissions could be reversed in the discretion of the court; and asks the Utah Supreme court to vacate that Trial #1 for a more completely heard Trial.

Appellant also asks the Supreme court to make a decision on Appellant's Affidavit of Impecuniosity herein but objected to and filed timely.

Executed this 20th day
of May 2001, and submitted
this 29day of May, 2001. Signed: Robert F. Glynn III

Appellant Pro Se

Robert Flynn III
1265 N Carbonville Rd #24
Price Ut. 84501
Appellant (Pro Se)

IN THE UTAH SUPREME COURT

o

Tire King, Inc.,	)	
	)	**BRIEF OF APPELLANT**
Plaintiff and Appellee,	)	
	)	**Case: 20010172-SC**
v	)	
	)	
Robert Flynn III,	)	
	)	
Defendant and Appellant	)	

This transmittal certifies that the Appellant in the above case has timely (May 29 2001) submitted his Brief as required by rules, and served the opposing counsel.

Dated this 24th day of May 2001.

Appellant Pro Se:

Robert J Flynn III

CERTIFICATE OF SERVICE
BRIEF FOR APPELLANT:

I Robert Flynn, Appellant in the case 20010172-SC certify that on the dates and time below that I did serve the people as shown by mail, postage paid, with copies as shown

	copies	method	name
May 25, 2001	9 copy 1 orig.	Mail	Ut. supreme Court Appellate Clerk Off. 450 So State, 5th floor PO BOX 140210 SLC Ut. 84114-0210
May 25, 2001	2 copy	Mail	Keith Chiara Attorney 98N 400E PO BOX 955 Price Ut. 84501

Executed this 25th day of
May 2001

Appellant Pro se

Robert Flynn III
1265 N Carbonville Rd #24
Price Ut. 84501

Case: 20010172-SC ADDENDUM

#1: Transcript (1st 10 Min)*

#2: Notice of Appeal/Attachment date: 14Feb01

#3: Appeal Court Order date: 26Feb01

#4: Memorandum Decision date: 11Oct00

#5: Ruling. Motion New Trial/ & Motion date: 8Feb01
date: 17Nov00

#6: Objection. Motion for New Trial date: 22Nov00

#7 Answer. P. Discovery date: 27Mar00/

#8: P. discovery date: 06Mar00/ (8)a-(8)h documents

#9: Answer to Complaint date: 11Feb00

#10: Complaint date: 7Feb00

#11: Response to Def., Memorandum to Dismiss

#A: Copy: §2/3 17Am Jur 2d (continuance; URCP(40)

#B: Copy §78-24-5 Jud. Code

#C: Copy: §42 17Am Jur 2d (Contempt) ORderliness

#D: Copy: §20-22/157, 158 62Am Jur 2d Analysis defects

#E: Copy: §161-164 62 Am Jur 2d (Process Defect)

#F: Copy: P. Subpoenas/Aider; Copy: URCP(45)h.

#G: Copy: §791, § 783 5Am Jur 2d (Appeal Error)

#H: Copy: §71-7-3 Jud Code (Impec Lit)/Affidavit date: 21Feb01

#I: Copy: URCP(8) general Pleading (8(c) fraud);

#J: Copy: Jud Code Theft (§76-6-404)

(*) VHS Tape was requested timely

Robert Flynn III
1265 No Carbonville Rd #24
Price Ut 84501
Petitioner
Case: 20010172-SC
Docket (000700120)

To: Official Shorthand Transcriber
Seventh Judicial District Court of Carbon County

Re: Request for a limited transcript
Tire King v Robert Flynn (Docket above)

Dear Transcriber:

You are hereby requested for the above Supreme Court Case (# 20010172-SC) to prepare, certify and transmit to Petitioner(above) the following selected item only for the purposes of determining the record on Petitioners Subpoenas Rulings during his trial (case 000700120) September 7 2000

item

transcribed copies of testimonies or hearing on the Subpoenas at or from 9AM September 7 2000 for the case, and next sequential 10 minutes only.

You are hereby asked to acknowledge receipt of this request into the indexing records as needed, and send a copy to Petitioner at the above address. (By May 8 2001)

This letter certifies that I have made this request, and paid for the request, and mailed copies to the Respondents named.

Executed this 1st day of MAy, 2001.

Robert F Flynn III
Petitioner and Defendant

cc.. Clerk of Trial Court
Clerk of The Utah Supreme Court
Attorney of Respondent.

#1 Transcripts

[redacted] 20010172-SC
[redacted] FLYNN v TIRE KING

Transcript Request / Billing Statement / Appellate Court Notification
Sixth and Seventh Districts

[redacted] Please Return this Statement With Payment Amount Due

Transcript Request Date: MAY 1 01
Clerk: Tricia Atwood
Case and Hearing Type: CIVIL
Date Transcript is needed: MAY 8 01
Case Name: TIRE KING V FLYNN
Mail Transcript X
*** I will pick it up** ___
Case Number: (000700120
Date(s) of Hearing: 7SEPT00
Judge: ~~BOYCE K BRYNER~~
Court Location: Price
Hearing Type(s): ~~SUPREME COURT CASE ABOVE~~
(Circle One) **Original &** (1 Copy)
Requested by: PETITIONER
ADD: 1 VHS TAPE
Original and 1 **Copies**
Address: 1265 NO CARBONVILLE RD #24 PRICE 84501

Phone & Fax: 435-650-1639CELL
Case on Appeal? Y X N **Supreme Court Case #** ABOVE **Appellate #** _____

Date	Record a=audio v=video r=reporter	Tape counter beginning	Tape Counter ending	Estimated # of Pages	

Reporter:
Transcribed Joe Lid
Appeal case only:
Date Acknowledgmer
Date Notice of Filing

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATER MARK. HOLD AT AN ANGLE TO VIEW.

MONEY ORDER

02-441519304

82-40/1021

Albertsons (ISSUING AGENT)

AGENT 468615 DATE 050401
TIME 0915 03
024415193045 LOCATION 000396

50 00 ****

** PAY EXACTLY FIFTY DOLLARS AND NO CENTS **********

PAY EXACTLY
NOT GOOD OVER $500
PAY TO THE ORDER OF Seventh District Court

PURCHASER'S ADDRESS 20010172-SC

Robert Flynn
PURCHASER BY SIGNING YOU AGREE TO THE TERMS ON THE REVERSE SIDE.

For Transcript Costs
civil HS

K Patmore
AUTHORIZED REPRESENTATIVE

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Date Deposit Received and Receipt #		**Deposit Amount Requested:**	$ 35.00 **
Actual # of Pages:		Deposit Amount Received:	$
add: one VHS TAPE PER SCHEDULE	15.00$	Actual End Cost:	$
		Plus Postage:	$
Date Amount Outstanding Paid:		Total Amount Due:	$
Date Refund Check Issued:		**Amount Outstanding:**	$

#41579

*MO # 35.00

1 VHS TAPE : 15.00 for supreme court if they need it

50.00

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Promise to Pay Form Received:			
Actual # of Pages:		Actual End Cost:	$
Date Acct. Receivable Set Up:		Plus Postage:	$
Date Billed:		Total Amount Due:	$0.00
Date Trust Check Issued:		Trust Check #	

MAY 4 2001 Robert F. Lynch PETITIONER

Remit payment to 7th District Court, 149 E. 100 S., Price, UT 84501

***CASHIER: Duplicate receipt is to be forwarded to the designated Clerk and a copy sent to Brent Bowcutt.**

CERTIFICATE OF MAILINGS

I the undersigned certify that on this 1st day of May 2001 that I mailed and served a correct copy of this request for limited transcription to the named parties prepaid:

1. Clerk of The Utah Supreme Court

   Office of the Clerk of The supreme Court
   450 South State
   PO BOX 140210
   Salt Lake City Ut. 84114-0210

2. Counsel of Record

   Keith Chiara attorney
   98 N 400E
   PO BOX 955
   Price Ut 84501

Executed 01MAY 2001

Petitioner and Defendant
Case: 20010172-SC

Robert Flynn III.

UTAH COURT OF APPEALS

TIRE KING INC., Plaintiff/ Appellee, VS. ROBERT FLYNN III Defendant/ Appellant.	APPEAL OF RULING ON MOTION FOR A NEW TRIAL AND STAY. CASE NO. 000700120 JUDGE BRYCE K. BRYNER

The Defendant Robert Flynn comes now before the Utah Court of Appeal, from the Seventh Judicial District Court of Carbon County, Utah in the above entitled case to argue 1 Review, and 2. Ruling on whether the denial of his "motion for Continuance" on September 7 2000 by the District Court was a violation of his other rights of Due Process, under the Constitution of Utah Article I, Section(7). The Defendant asks the Appeal Court to waive any bond in this appeal, as no Final Judgement in the Civil Case is yet final.

At issue before the appeal court is whether the motion for the Continuance, by the Defendant was timely considering all of the mitigating circumstances (III.) as made to the Seventh Judicial District Court, and whether the rights in granting the motion out-weigh rights of Plaintiffs, to allow for such.

The Seventh Judicial District Courts Merit Analysis for the denial of the Defendant's Motion of September 7 2000 is given at (I), and facts of the general case at (II), and the other mitigating circumstances affecting the Continuance Motion is at (III).

Executed this 14th day of February, 2001 DEFENDANT PRO SE

Robert J. Flynn III

I. THE SEVENTH JUDICIAL DISTRICT COURT MERIT ANALYSIS OF MOTION BY DEFENDANT FOR NEW TRIAL

November 17 2000 a timely Motion For New Trial was filed by the Defendant on The Seventh Judicial District Court of Utah Carbon County based upon the Defendant's Claim (1) and Court Claim (2):

1. That he was denied a fair trial because the Court refused on the day of trial to continue the trial to allow the Defendant to subpoena a witness [a witness for which an initial subpoena was issued on February 18 2000, but had a flaw in it]

2. That the judge in his discretionary powers over this motion had weighed, and ruled against that motion[which was timely in the Defendants mind,]because it was NOT timely for the Court, and would prejudice the Plaintiffs .

The Seventh District Court of Carbon County issued its ruling on that motion on February 8 2001 citing reason (2) without bracket saying further it was not abuse of discretion of the court, and did not deprive him of Due Process.

The issues were then clearly:"timeliness" and "prejudice" were too great a factor in the courts mind compared to the right of the Defendant to have a witness. However, without this witness the Defense was to present NO case in that trial September 7, 2000; The Defendant motion was presented at 9:05 AM at the start of trial before testimony as court record will show and was as timely as possible considering the witness he subpoened did not appear as expected and the Defendant had no prior knowing of this factor. Plaintiffs did NOT REPORT the error to court.

The right of having his witness to present his case within Due Process is not in an of itself a "prejudice"; It was only a question of a dely in trial to allow Due Process to work. The Constitutional Rights are somewhat higher rights than inconveniences, and both parties were inconvenienced in time and money, whereas also the presumption of Defendant innocence must be also born in mind compared to just time and inconviences.

II. GENERAL FACTS OF THIS CASE BEFORE THE SEVENTH JUDICIAL DISTRICT COURT IN CARBON COUNTY.

The facts of this case are that an original civil dispute between the two parties emerged and agreements as friends were abondoned leading to the need of a Judge, and a complaint was filed by the Plaintiffs on February 07 2000; Since the complaint contained both civil and "apparant" criminal allegations the Defendant bitterly opposed the entry of this document into Court; As the "criminal parts" made by Plaintiffs were known to be meritless, false, and injurious to the Defendant, and had been officially dropped by both Sheriff and DA of Carbon County before that.

Defendant filed a timely response, and Subpoeona for the one witness who could clear this matter up, the Plaintiff himself by February 18 2000; The documents served were accepted by all parties without any formal, or informal "objections" as well as by the Court involved, however, unknown to Defendant during the entire period from February 18 2000 until trial, on September 7 2000 that a date omission in the said Subpoena would invalidate the Subpoena; The Plaintiffs while having a valid "excuse" to "object" to Subpoena chose to hold the document until moment of trial to announce their noncompliance.

At 9:05AM, September 7 2000 the Defendant on learning of these facts chose to stand up for his equal rights to oppose this to the judge by objection, or motion, and ask for some remedy such as time, or continuance etc., while the Plaintiff attorney "apologized" for any role in the matter he had, and the motion was denied. The trial completed with other objections by the Defendant for the situation of not having his witness, and a Memorandum of Decision was filed, and then reversed on November 29, 2000 because Defendant made an additional motion on a timely basis for a Stay and New Trial"; Which was subsequently denied on BFebruary 8, 2001. The basis was the error, or not, on the Motion For Continuance by the Defendant the day of trial which is the most timely, or humanly possible moment possible given the way the Subpoena was handled by Plaintiffs.

This issue then is now being brought before the Utah Appelate Court system. The Final Order and Judgement have not yet been issued by the Court, and a 8 day period in currently in effect for "objection" to its form and content by Judge Bryner. Hence, the request for waiving "bond" might be appropriate until this matter is settled.

III. THE DEFENSES' MITIGATING FACTORS IN THE MOTION FOR CONTINUANCE SEPTEMBER 7 2000

The Subpoena involved was issued and served on Plaintiffs on February 18, 2000 and filed with the court in Carbon County, however, the Defendant had unknowly left out the time and date portion, hence giving the Plaintiff himself, a witness, the right of "excuse" to not comply with the subpoena; An issue that was brought for the Court's attentions for the first time that morning of trial, September 7 2000. This being the sole issue then before the Court when the "Motion For Continuance" was presented at 9:05 AM.[By Defendant]

The Plaintiff Attorney "apologized" to the court for whatever role he had in not reporting the known [to Plaintiffs] error to the Court for correction, or further order; It was not known why this course of action was taken by Plaintiffs but the presumption is (was) that that attorney was caught between two responsibilities 1 To his client who did not want to testify necessarily, and 2 Any responsibility; as an officer of the Court, to resolve the subpoena; In these regards:

The motion for continuance was brought by Defendant to protect his rights in as much the same way the Plaintiff attorney was try -ing to protect the right of his client; The Court allowed one side to prevail in this protection issue, but not the other, however the Defendant had presumptions of innocence and Due Process on his side as he was charged with the "complaint" and there were other cross issues the Defendant needed to expose to complete his "answer" and contention therein in the Civil Case.

Thus the "mitigating" factor brought to bear on the Defendant's Motion for Continunace was the degree of, and harshness of the loss he would suffer in rights compared to those of time and inconveniences to the court or Plaintiffs.

CERTIFICATE OF MAILING

I the undersigned, certify that on the 14th day of February that I mailed a correct copy of the forgoing APPEAL first class, postage prepaid to the following

1 Mr Keith Chiara
Chiara Law Offices
98 N 400E
Price Utah 84501

2 Seventh Judicial District Court
of Carbon County
Carbon County Court Complex
149 E 100S
Price Ut 84501

Case 000700120

DEFENDANT PROSE

Robert F Lyman III

1265 N Carbonville Rd.
#24
Price Ut 84501

IN THE UTAH COURT OF APPEALS

---oo0oo---

Tire King Inc., Plaintiff and Appellee, v. Robert Flynn III, Defendant and Appellant.	ORDER Trial Court No. 000700120

This matter is before the court on its own motion to transfer the appeal pursuant to Rule 44 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the appeal is transferred to the Utah Supreme Court because it is taken from an order, judgment or decree of a district court in a civil case, not involving domestic relations, and is not within the original appellate jurisdiction of the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2a-3(2)(h)(1996). See Utah Code Ann. § 78-2-2(3)(j)(1996).

Dated this 26th day of February, 2001.

FOR THE COURT:

Paulette Stagg
Paulette Stagg,
Clerk of the Court

#3 Appeal Courts orders

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
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Richard C. Howe
Chief Justice

Leonard H. Russon
Associate Chief Justice

Christine M. Durham
Justice

Matthew B. Durrant
Justice

Michael J. Wilkins
Justice

Marilyn M. Branch
Appellate Court Administrator

Pat H. Bartholomew
Clerk

April 17, 2001

Robert Flynn III
1265 N Carbonville Rd #24
Price UT 84501

RE: Tire King v. Flynn Supreme Court No. 20010172-SC

Dear Counsel:

The record index (#000700120) on this appeal was filed in this court. The record remains on file with the trial court for your use in preparing your brief. The purpose of this letter, therefore, is to set the briefing schedule.

Pursuant to Rules 13 and 26, Utah Rules of Appellate Procedure, the appellant's brief must be served and filed on or before May 29, 2001. This due date takes into consideration the three days mailing provision of Rule 22(d).

Parties are advised to refer to Rules 24, 26 and 27, Utah R. App. P., for content and format requirements.

All parties are specifically advised that the typeface requirements of Rule 27(b), Utah R. App. P., will be strictly enforced and noncomplying briefs will be rejected. A proportionally spaced typeface must be 13-point or larger for text and footnotes. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes.

Please be reminded that in civil cases where the record, excluding any transcripts, totals 300 pages or more, all parties must file with the clerk of the trial court, within 10 days after briefing is completed, a joint or separate designation of those papers referred to in their respective briefs. Only those designated papers, and those papers identified in Rule 11(d)(2)(B) of the Utah Rules of Appellate Procedure, will be transmitted to this court by the clerk of the trial court.

Sincerely,
Ardis Brown
Deputy Clerk

cc:KEITH H. CHIARA

IN THE SEVENTH DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

TIRE KING INC.,	)	**MEMORANDUM DECISION**
Plaintiff,	)	
VS.	)	
ROBERT FLYNN,.	)	Case No. 000700120
Defendant.	)	Judge Bryce K. Bryner

This matter came on regularly for trial on September 7, 2000. The court heard the sworn testimony of the parties and their witnesses, received exhibits into evidence, heard the arguments of counsel, took the matter under advisement, and now issues this memorandum decision.

Plaintiff seeks judgment against the defendant for $2,354.05 for parts, labor, and services provided to defendant's 1964 Chrysler and two other vehicles, together with accrued interest, attorney fees, and costs. The defendant contends that the defendant breached the agreement to repair the Chrysler by performing work that was not authorized.

From the evidence presented the court finds:

1. On May 26, 1999, the defendant signed a work order (Ex. #1) that described repairs that were to be made by plaintiff to defendant's 1964 Chrysler.

2. On September 20, 2000, plaintiff prepared an invoice detailing the work that was performed on the defendant's Chrysler as well as some work performed at defendant's request on a Blazer and a Buick. The total cost was $4854.05. The Defendant received a credit for $2,500 previously paid as a deposit, leaving a balance due of $2,354.05.

3. After plaintiff examined the Chrysler engine, it was determined that it should be taken to Clegg Automotive in Orem for engine work that is normally farmed out by plaintiff. The

defendant personally transported the engine to Orem and thereby consented to the engine being removed from the car and the work by Clegg being performed. The plaintiff paid the bill to Clegg Automotive in the amount of $736.33, and charged the defendant for that expense and listed it on Ex. #2.

4. The defendant never complained to the plaintiff that the work being performed was not authorized.

5. After the engine was returned from Clegg Automotive for a second time and was reinstalled, the car was started but the transmission linkage would not operate properly and the transmission remained in reverse. Mr. Greg Franklin, a mechanic with plaintiff, testified that the defendant told him to remove the transmission. However, the defendant testified that he was not present when the transmission was removed and that he did not authorize the transmission to be removed from the car, and he contends he should not be charged $240 for its removal and installation. In any event, the transmission was then taken to TRI for repairs by the defendant and Mr. Franklin accompanied him.

The court finds that the defendant authorized the transmission to be removed. Moreover, on August 10, 1999, at the bottom of Ex #3, the defendant ratified the removal by the instruction he wrote directing the plaintiff to "include transmission work on my bill until all work is done. OK?" Ex.#3 was written by the defendant after the transmission had been removed from the car.

6. The court finds that on September 11, 1999, the defendant justifiably removed the Chrysler from the plaintiff's premises because it had not been worked on for about three weeks. The court finds however, that the removal of the car prevented the plaintiff from completing some minor repairs on the car, to wit: fine tuning the transmission and the engine, state inspection, and completing work on the brakes. The court finds that the total amount on Ex. 2 included the cost of performing that final work. Because it was not performed, the bill is to be

reduced by the value of the work not completed. The court was not presented with any evidence from which it could determine the reasonable value of the work that has not yet been performed. For that reason, the court will conduct a hearing on October 25, 2000, at 1:30 p.m. for the purpose of taking testimony on the value of the work not completed.

The court declines to make an award of attorney fees in this case for the reason that the court finds the defense presented by the defendant was brought in good faith. The defendant presented eleven reasons why the plaintiff should not be awarded the relief requested in the complaint. The fact that the court has rejected those reasons does not mean the defense was not asserted in good faith.

Based on the foregoing, the court finds that the plaintiff should be awarded judgment in the amount of $2354.05, less the value of the work not completed.

Once the hearing is completed on October 25th, counsel for the plaintiff is directed to prepare appropriate Findings of Fact, Conclusions of Law, and a Judgment consistent with this memorandum decision.

DATED this 11th day of October, 2000.

Bryce K. Bryner, Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000700120 by the method and on the date specified.

METHOD	NAME
Mail	ROBERT FLYNN DEFENDANT 1265 North Carbonville Rd Price, UT 84501
Mail	KEITH CHIARA ATTORNEY P.O. BOX 955 PRICE UT 84501

Dated this 11th day of Oct, 20DD.

Deputy Court Clerk

IN THE SEVENTH DISTRICT COURT IN AND FOR
CARBON COUNTY, STATE OF UTAH

TIRE KING INC., Plaintiff,	)	**RULING ON DEFENDANT'S MOTION FOR STAY OF ORDER AND MOTION FOR NEW TRIAL**
VS.	)	
ROBERT FLYNN,. Defendant.	)	Case No. 000700120
	)	Judge Bryce K. Bryner

Trial in this matter was held on September 7, 2000. The court took the case under advisement and issued its *Amended Memorandum Decision* on October 25, 2000. The plaintiff prepared proposed *Findings of Fact and Conclusions of Law* and a proposed *Judgment and Order* and mailed copies to the defendant. The defendant timely filed a pro se *Motion for Stay of Order and Motion for New Trial*, to which the plaintiff filed an *Objection* and the defendant filed a *Response*. A Notice to Submit for Decision has been filed and the court now issues this ruling.

The defendant's motion claims:

1. That he was denied a fair trial because the court refused on the day of trial to continue the trial to allow the defendant to subpoena a witness, thereby denying him his right to due process.

2. That the damages awarded to the plaintiff are beyond the ability of the defendant to pay.

I. Was the Defendant Denied a Fair Trial and Due Process?

Under Rule 59 (a) (1) URCP, a new trial may be ordered if either party was prevented from having a fair trial by an irregularity in the proceedings of the court or an abuse of discretion by the court. The defendant claims that the court abused its discretion by refusing to allow the

#5 a) Ruling

defendant a continuance to subpoena a witness, Mr. Paul Pugliese.

The court finds that the claim is without merit because the defendant's motion for a continuance was untimely. The defendant made the motion during the second day of trial on September 7, 2000. The defendant had previously served a subpoena on Mr. Pugliese on February 18, 2000, which was four months before the case was set for trial pursuant to a Ruling dated June 26, 2000. The defective subpoena therefore could not and did not specify a date and time for Mr. Pugliese to appear. The court finds that there was adequate time between the date of setting the trial (June 26, 2000) and the date of the trial (September 7, 2000) to issue a new subpoena with the proper date and time inserted. The defendant has presented no valid reason why a new subpoena could not have been timely served to obtain the presence of Mr. Pugliese. To have granted a continuance at that stage of the proceedings would have prejudiced the plaintiff by causing him to incur additional delay and would have caused him to incur additional attorney fees. The court therefore finds that the refusal of the court to grant a continuance was neither an irregularity in the proceedings nor was it an abuse of discretion that prevented the defendant from having a fair trial nor did it deprive him of due process of law.

II. Defendant's Allegation That the Damages are Beyond his Ability to Pay

The defendant alleges that "[T]he damages assessed to the Defendant are excessive beyond his ability to even pay." In support thereof he claims; (1) that he could not rebut the amount of the bill because he was deprived of the right to examine Mr. Paul Pugliese as a result of the court not allowing a continuance; and (2) unauthorized work was performed on defendant's automobile but could not be proved without the testimony of Mr. Pugliese.

The court finds that this argument is essentially the same argument presented in the defendant's first claim, i.e., that the defendant was deprived of the right to examine a witness

when the court refused to grant a continuance. For the reasons set forth in Section I above, the court finds that the defendant's claim is without merit.

Based on the foregoing, the court finds that there was no irregularity in the proceedings of the court which prevented the defendant from having a fair trial. Accordingly, the motion for a stay of proceedings and the motion for a new trial are denied.

DATED this 6th day of February, 2001.

Bryce K. Bryner
District Judge

Rcbert Flynn
1265N.Carbonville Rd #92/#24
Price, Utah 84501
Defendant(Pro Per)

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY,
STATE OF UTAH

Tire King, Inc., Plaintiff, vs. Robert Flynn, Defendant.	MOTION FOR STAY OF ORDER AND MOTION FOR NEW TRIAL Civil 000700120 Judge: Bryce K. Bryner

The above case has come before the Courts and a Final Judgement is immanant;

Comes now the Defendant acting in his own behalf and asks the Court for a STAY and MOTION FOR NEW TRIAL; Pending any further rulings and appeals.

Under CIVIL Rule 59(1):

1. Defendant was not offered a fair trial because a Subpoena decision ruled on Defendant during trial did obstruct or other wise deny his right to his only named witness, the Plaintiff. Thus denial of some Due Process.

a. Under discretions therein time should have been offered as needed to obtain such witness or corrections of subpoena a harmless error but one denying Due Process.

b. This was unfair to the Defendant, undermines his ability to present an assertive defense against the unfounded dollars demanded by Plaintiffs and monies for work not done.

c. Opened the door to misrepresenting, in the Courts decision Memorandum, the Defendants very own words of his "Contention " ie the Defendant did not say " Plaintiff breached the agreement to repair the Chrysler by performing work that w not authorized "; The Defendant own ANSWER TO COMPLAINT sa what the Defendant did say: [Dated Feb 11, 2000]

"Plaintiffs failed to provide all and adequate services to the defendant, misuses of the 2500.00 given, and forfeiture of all agreements for said goods and services." Testimony also underlines this point of view not the Court interpre -tations. The Court Memorandum appear to concur.

Motion #5 b

c.1
Whether such dollars is unauthorized is not knowable to the

CIVIL
Under Rule 59 (5):

2. The damages assessed to the Defendant are excessive beyond his ability to even pay.

a. Without the right to assertive defense and his only witness, Defendant could not rebut the excessive dollars that were claimed in the bill and adjudged agaist same.

b. While it was true that unauthorized work was done but not testified to by Plaintiff himself, dollars as to agreement and contracts were not legally proven by the Plaintiffs. [The actual Plaintiff was not in Court]

Defendant did have as the Court says written agreements [Exhibits: #1] but no credits against excessive charges for unauthorized dollars shown in [Exhibit #8] were even considered in the Courts decisions (2500.00 was the limit imposed in May 1999) These points are all provable only if the witness for the Defendant can be crossexamined. Monies for work not done is a different credit due Defendant. Dollars were not in any agreement (s) which Plaintiffs offered the court.

Consequently, although a subpoena was turned over to the Clerk of the Court, and even served and paid for by the Defendant it was never officially filed by the Court and dates never established; which rightly or wrongly did serve to deny the Defendant in the above case, his due process in full amounts as prescribed under the UTAH Constitution, Art. I Sec (7).

Dated this 17th day of November, 2000.

DEFENDANT Robert Elgin

AFFADAVIT

I ROBERT I FLYNN do swear on this day, Nov 17, 2000 :

That in the above motions asked for that to the best of my ability turned over to the Court Clerk, on 02-17-00 forms For Subpoena for Plaintiff in the above entitled case acting on my own behalf.

AS far as I can say it was never officially filed on that day discovered Nov 2000, on inspecting record.

SIGNED Robert Flynn

2 ATTACHMENTS A. Receipt of service
B. Clerks Receipt

ATTACHMENT AFFADAVIT

Carbon County Sheriff's Office
240 West Main Street
Price, Utah 84501
(435) 636-3251

***** C O U N T E R R E C E I P T *****

Receipt No - **2000014** Date - **02-17-00**

Amount Paid - **$7.00** pd for
Check No - **CASH**

Payment By - **FLYNN, ROBERT**

Description - **SUB**

Received By - **KOBE, DEBORAH A**

CERTIFICATE OF MAILING

I, the undersigned, certify that on the 17th day of November, 2000, that I mailed a true and correct copy of Motion to Stay with Motion for New Trial, first class postage prepaid to:

CHIARA LAW OFFICES
KEITH CHIARA

98 NORTH 400 EAST
PRICE UTAH 84501

Robert Flynn
DEFENDANT(PRO PER)

ATTACHMENT AFFADAVIT

Name Bar Number

Robert Flynn

Address

1265 No carbonville rd

City, State ZIP

Price Ut. 84501

Telephone

Attorney for the defendant (Pro Per)

IN THE SEVENTH DISTRICT COURT, STATE OF UTAH
CARBON COUNTY

Tire king corp., Plaintiff,	**SUBPOENA**
v.	
Robert Flynn, Defendant.	Case No. 000700620

TO: PAUL PUGLIESE OWNER TIRE KING

YOU ARE COMMANDED:

[X] to appear in the seventh district Court at the place, date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):

1. Plaintiffs bill to defendant dated 9-20-99

2. Dates of payments of transmission to TRI, & [777 E Main, Price UT]

3. The original verified agreement of defendant with Tire King Inc (Complaint, item 5)

[ ] to permit inspection of the following premises at the date and time specified below.

PLACE DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other person who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Utah Rules of Civil Procedure.

Dennis Olson DATE: 2-17-00

CLERK OR ATTORNEY FOR PLAINTIFF/ DEFENDANT

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including communicative aids and services) during this proceeding should call 1-800-992-0172, at least THREE working days prior to the scheduled proceeding.

ORIGINAL

Keith H. Chiara #0621
98 North 400 East
P. O. Box 955
Price, UT 84501
Telephone: (435) 637-7011
Facsimile: (435) 636-0138
Attorney for Rebel Bail Bonds

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

TIRE KING, INC., Plaintiff. Vs. **ROBERT FLYNN,** Defendant.	**OBJECTION TO MOTION FOR STAY OF ORDER AND MOTION FOR NEW TRIAL** Civil No. 000700120 Judge Bryce K. Bryner

COMES NOW Plaintiff, by and through its attorney of record, Keith H. Chiara, and objects to granting of Defendant's Motion for Stay of Order and his Motion for New Trial for the following reasons:

1. Defendant moves for a new trial pursuant to URCP 59(1). It is assumed he means URCP 59(a)(1). Defendant claims he was not given a fair trial because he subpoenaed Paul Pugliese and Paul Pugliese did not appear. He attaches a copy of the subpoena to his motion.

Defendant raised the issue of Paul Pugliese's failure to appear on Defendant's "subpoena" at the trial. A copy of the "subpoena" was produced and reviewed. The "subpoena" was incomplete in that it did not give a date for appearance and therefore was clearly deficient.

2. The subpoena was dated 2-17-00. The trial in this case was not even selected by the Court until June 26, 2000, more than four (4) months after the date of the "subpoena".

Because no trial had been set and because the subpoena was not dated, Plaintiff treated the subpoena as a discovery tool, or a Subpoena Duces Tecum and provided Defendant with those items requested insofar as Plaintiff had them in its possession.

3. At trial, the Court determined that the Defendant's subpoena did not require Mr. Pugliese to appear on the date of trial. It is not the Court's responsibility to guide the Defendant through the trial or to act as Defendant's attorney to protect Defendant from his own failings.

4. In Defendant's Motion, under 1a, Defendant apparently suggests that, during the trial, when he was informed that he had not properly served Paul Pugliese with a subpoena, the Court should have recessed and allowed him time to subpoena Paul Pugliese. Plaintiff's complaint was filed on February 7, 2000. Between that date and the date of trial, on September 7, 2000, Defendant filed several different motions and other documents requiring Plaintiff to respond in writing to preserve its claims against Defendant. Defendant had plenty of time to seek the advice of legal counsel, do research in the Utah Rules of Civil Procedure, or any other thing he needed to do in preparation for trial. He had no right, at the time of trial, to expect the Court to recess the trial, or continue the proceedings until he had properly subpoenaed Paul Pugliese. He requested the Court allow him to do that, and the Court declined. He is not now entitled to a whole new trial because he alone failed to properly follow the rules of Court. He claims that he is being denied his right to due process. However, he is only looking at one side of the issue. If the Court were to grant his motion for a new trial at this time, solely because of the Defendant's own

failures, the Court would be denying Plaintiff due process. Certainly Plaintiff is as entitled to due process of law as is the Defendant.

5. Under Defendant's paragraph 1b, Defendant again claims that the actions of the Court were unfair to the Defendant, claiming that the Court's ruling undermines the Defendant's ability to present an assertive defense. The Court did no such thing. The Defendant was free to obtain competent legal counsel, and he was free to properly prepare. The Defendant alone undermined his own ability to present his defense. Interestingly, the Court greatly relaxed the rules for presenting evidence, and allowed the Defendant extremely great latitude in presenting his evidence and arguments, including when he presented his evidence and when he cross examined Plaintiff's witnesses. For Defendant to now accuse the Court of undermining Defendant's case is very unfair to the Court, and is not truthful.

6. In Defendant's paragraph 1c, it appears as though Defendant's objection to the Court's decision is merely that the Defendant views the evidence differently than the Court views it. The Court is entitled to view the evidence differently from what the Defendant claims the evidence to be, based upon all of the evidence presented before the Court, including evidence presented by the Plaintiff. Simply because the Court does not accept the Defendant's representations as to what the evidence is, does not mean that the Court is wrong and the Defendant is right, and the Defendant is entitled to have a whole new trial to repeat the same evidence the Court did not believe during the previous trial. In paragraph 1c, the Defendant appears to merely be rearguing the same things that he argued to the Court during the trial. Having presented his evidence and

made his arguments once, if the Court does not accept his position, that does not mean that he is entitled to a new trial under URCP 59.

7. Under paragraph 2 of Defendant's Motion, the Defendant claims he is seeking a new trial based upon URCP 59(a)(5). In this assertion however, Defendant apparently did not read the grounds for a new trial that are provided for under Rule 59(a)(5), because the Court did not award damages in this case, but awarded the amount due to Plaintiff pursuant to an agreement between the parties for the Plaintiff to provide parts, labor and services and for Defendant to pay for the parts, labor and services. No damages were awarded. Certainly, nothing was awarded to the Plaintiff "under the influence of passion or prejudice". If anything, the District Court Judge acted in a very reserved and calm manner, carefully listened to all of the evidence, allowed the Defendant great latitude in presenting his case and cross examining the Plaintiff's witnesses, took the matter under advisement, issued a Memorandum Decision, set a second hearing for October 25, 2000, issued an Amended Memorandum Decision, and ordered judgment in behalf of the Plaintiff based upon the evidence presented at the trial and subsequent hearing. Interestingly, although the Defendant was fully informed of the hearing date for the second hearing, Defendant failed to appear.

8. As with Defendant's paragraph 1, Defendant's paragraph 2 is more re-argument of his case than statement of legitimate grounds for granting his motion. All of the things that he states in his paragraph 2 were argued by him before the Court in the September trial and he had the opportunity to present any other arguments in the October 26th hearing. Defendant was not denied due process, nor was he treated unfairly, nor did the Court makes its decision based upon

the influence of passion or prejudice. Defendant has filed this motion simply because he does not want to pay a legitimate debt that he owes to the Plaintiff. For that reason his motion should be denied and he should be required to pay Plaintiff's attorneys fees for having to respond to these motions for a stay of the order and for a new trial.

PLAINTIFF PRAYS FOR AN ORDER OF THE COURT DENYING DEFENDANT'S MOTION FOR A NEW TRIAL AND FOR SETTING ASIDE THE JUDGMENT, SO PLAINTIFF CAN PROCEED, IN ACCORDANCE WITH LAW, TO RECOVER THE DEBT OWED BY DEFENDANT TO THE PLAINTIFF.

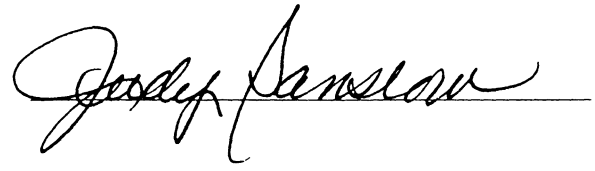
DATED this 22 day of November, 2000.

Keith H. Chiara
Attorney for Plaintiff

CERTIFICATE OF MAILING

On the 22nd day of November, 2000, I personally mailed a true and correct copy of the foregoing Objection to Motion for Stay of Order and Motion for New Trial, postage prepaid to the following address:

Robert Flynn
1265 No. Carbonville Rd.
#92/#24
Price, Utah 84501



Keith H. Chiara, #0621
CHIARA LAW OFFICES
98 North 400 East
Price, Utah 84501
Telephone: (435) 637-7011
Attorney for Plaintiff

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY, STATE OF UTAH

Tire King, Inc., a Utah Corporation, **Plaintiff,** **vs.** **Robert Flynn,** **Defendant.**	**RESPONSE TO DEFENDANT'S REQUEST FOR DISCOVERY** **Civil No.: 000700120** **Judge: Bryce K. Bryner**

In an effort to provide discovery to Defendant, whether he complies with the Utah Rules of Civil Procedure or not, Plaintiff responds to Defendant's March 6, 2000 request as follows:

1. Plaintiff's attorney is providing copies of all papers relating to Defendant's obligation to Tire King presently available. However, some agreements and instructions from Defendant were not written, but were oral and still binding upon Defendant. Plaintiff is not obligated to deliver the original papers.

2. See copies of papers supplied.

3. See copies of papers supplied. Greg's time is basically included in the itemized statements. However, Greg wasn't the only mechanic that provided labor for Defendant's automobiles, and Greg was also working on other customers' automobiles. Tire King cannot

provide time cards that can show the exact amount of time Greg spent only on the Defendant's automobiles and there is no business requirement for Tire King to keep records for such.

Defendant is aware other mechanics, including Paul Pugliese, worked on his automobiles. Greg, as a mechanic, was never authorized to receive money from Defendant for his labor in lieu of Defendant's obligation to directly pay Tire King, and no money given by Defendant to Greg relieves Defendant of his obligation to pay Tire King.

4. See copies of papers supplied.

A. As to warranties, Defendant delivered the engine to Clegg Automotive and brought the repaired engine to Tire King to install. Although Tire King paid Clegg Automotive, any warranty was to be delivered to Defendant. Tire King repaired Clegg's work, but was not reimbursed by Clegg for its work. Obtaining reimbursement is the responsibility of Defendant, since Defendant is the party receiving any warranty given by Clegg.

B. As to any warranty for the transmission, Defendant took his transmission to Transmission Rebuild. Paul paid Transmission Rebuild in behalf of Defendant and installed the transmission. Defendant was supposed to take the vehicle to Transmission Rebuild to have the transmission "fine-tuned" and receive his warranty.

5. No "demand payment" letters were made to Defendant until counsel for Plaintiff sent a letter, dated September 27, 1999 and a second letter dated November 4, 1999 to the Defendant. Plaintiff then filed suit. No demand payment letters were sent prior to that time because Tire King was legally in possession of the Chrysler until Defendant illegally removed it from Tire King's possession.

6. There aren't any agreements between Tire King and Clegg Automotive for recovery of warranty monies because Defendant is the party with the warranty. Defendant is obligated to pay Tire King for its work and Defendant should then seek recovery from Clegg Automotive.

DATED this 24 day of March, 2000.

Keith H. Chiara
Attorney for Plaintiff, Tire King, Inc.

CERTIFICATE OF MAILING

I, the undersigned, certify that on the 24th day of March, 2000, I mailed a true and correct copy of the foregoing RESPONSE TO DEFENDANT'S REQUEST FOR DISCOVERY, first class, postage prepaid, to the following:

Mr. Robert Flynn
1265 North Carbonville Road, #92
Price, Utah 84501

Secretary

ROBERT FLYNN
DEFENDANT (PRO PER)
1265 No. Carbonville Rd.#92
Price Ut. 84501

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND
FOR CARBON COUNTY, STATE OF UTAH

TIRE KING Plaintiff, VS. ROBERT FLYNN, Defendant.	REQUEST FOR DISCOVERY Case No. 000700120 Judge Bryce K. Bryner

Defendant Robert Flynn requests of the Plaintiff's in the above entitled case, 000700120 Discovery for the following items:

. The original papers made and signed by Robert Flynn at Tire King. To include the original work order shown to exist in Plaintiffs 28Feb00 Response [May 1999 "agreements"].

. Associated to the "May agreements" all May 1999 through October 2000 debits, charges, sublet agreements and monies paid or received, parts and labor and dates applied for any and all work and including dates when applied to 2500$Deposite.

. Associated to "May Agreements" all related time-card data for mechanic (Greg) in the above periods and monies paid.

. Associated to items(1,2,3) subsequent modifications and other written agreements for contract changes authorized by either Paul Pugliese, or his secretary, or Greg, including all warranty changes and agreements on engine, or transmission.

. All Demand of Payments made to Defendant from May 1999 to September 11, 1999 .

. Written agreements between Tire King, and Clegg Automotive Company of Orem (if they exist) for recovery of any warranty monies.

P. Discovery #0

THE TIME AND PLACE IS AT DISCRETION OF PLAINTIFF.

Dated this 06 day of March, 2000.

Robert Flynn
DEFENDANT

Original Copy

CERTIFICATE OF SERVICE

I certify that a copy of the attached documents was sent to the following people for case 000700120 by methods and on the date specified

method	name
MAIL	Keith chiara ATTORNEY P.O. Box 995 Price, Ut 84501

Dated this 06 day of March, 20000.

Robert Flynn

Robert Flynn
DEFENDANT
(PRO PER)

Don Ryan

Aug. 1999

DUE to Paul P.?
Hold up till Thursday and 2 of the following

TO: Elsie

List or work Order # above # and
the following work to be done

work

A. change rear end fluid/gasket

B. Drain and flush Fuel tank out

C. check redo brake cyl. if needed

D. glass-pack muffler
use same size exh-pipe assy
(Not Dual.)

E Set running & check out

END

Robert

is clutch Transmission work on
my Bill until all work is done. ok?

8 via memo of P. 0 27

TIRE KING
535 EAST MAIN
PRICE, UTAH 84501
(801) 637-8473

383 2 BL
Labor for
Blazer 1 hr.

CAR MERICA®

NAME Robert Flynn
ADDRESS 1265 No. Carbonville Rd #92
CITY Price STATE UT. ZIP CODE 84501
PHONE CONTACT (637-2755 HOME PHONE FAX 637-3618

SERVICE REQUESTED 1000 ≈ Dep Zions ck #61-590011188 on all work below. Call if problems.

VISUAL INSPECTION ONLY

BRAKE SYSTEM

Drum	Rotor	Mfg. Spec.	Actual	Accept-able	Recom-mend	Position	Drum	Rotor	Mfg. Spec.	Actual	Accept-able	Recom-mend
						RR						
						LR						

	Estimated Per Cent Worn	Acceptable	Recommend	Rear	Est mated Per Cent Worn	Acceptable	Recommend
Linings	%			Pads/Linings	%		
Cyl.				Caliper/Cyl.			
				Hardware			
Seal				Bearing/Seal			
Hose(s)				Brake Hose(s)			

STEERING SYSTEM

CONVENTIONAL SUSPENSION	Accept-able	Recom-mend	MACPHERSON SUSPENSION	Accept-able	Recom-mend
Arm			Strut Assembly		
m			Bearing Repack		
End R Outer			Rack & Pinion Assembly		
End R Inner			Rack & Pinion Mounting Bushings		
End L Outer			Rod End R Outer		
End L Inner			Tie Rod End R Inner		
Sleeve R L			Tie Rod End L Outer		
Link			Tie Rod End L Inner		
			Bellows Boot R L		
Repack			Alignment Check		
ent Check			Shocks		

DRIVE SYSTEM

Wheel Drive	Acceptable	Recommend	Rear Wheel Drive	Acceptable	Recommend
			Front U-Joint		
			Rear U-Joint		
			Transmission Mount		

TIRES

8 Speed Rating

Less than 2/32 Tread Depth is Illegal in Many States

Air Pressure	Visible Damage	Acceptable: Tire Tread Depth in 32nds of an inch	Recommend: Trade In	Recommend: Replace
		12 - 11 - 10 - 9 - 8 - 7 - 6	5 - 4 - 3	2 - 1
		12 - 11 - 10 - 9 - 8 - 7 - 6	5 - 4 - 3	2 - 1
		12 - 11 - 10 - 9 - 8 - 7 - 6	5 - 4 - 3	2 - 1
		12 - 11 - 10 - 9 - 8 - 7 - 6	5 - 4 - 3	2 - 1

QTY	UNIT PRICE	PARTS DESCRIPTION
		note heads one off engine, and all removed parts in truck, semi-organized. (Radiator being repaired May 26'99)
		(1) Check Engine cyl. for damage Have Repaired if needed.
		(2) Remove Pan and inspect rods etc
		(3) Install heads and other parts as needed Restart Engine & check out
		(4) Needs oil Eng. Needs Oil Trans.
		(5) Install new tires on rims in Truck Balance
		(6) Check Repair (a) Brake system (b) Cooling System (c) steering system
		If need special parts let me know; Call when Running and Drivable thanks.

YOU ARE ENTITLED BY LAW TO THE RETURN OF ALL PARTS REPLACED EXCEPT THOSE WHICH ARE TOO HEAVY OR LARGE, AND THOSE REQUIRED TO BE SENT BACK TO THE MANUFACTURER OR DISTRIBUTOR BECAUSE OF WARRANTY WORK OR AN EXCHANGE AGREEMENT. YOU ARE ENTITLED TO INSPECT THE PARTS WHICH CANNOT BE RETURNED TO YOU.

REPAIRS MADE BY (NAME) Greg
X

X

THE INDEPENDENT DEALER NAMED ABOVE IS AUTHORIZED BY ME TO PERFORM THE DESCRIBED SERVICES AND REPAIRS, INCLUDING REPLACEMENT OF NECESSARY PARTS. DEALER OR HIS EMPLOYEES MAY OPERATE VEHICLE FOR INSPECTION, TESTING OR DELIVERY AT MY RISK. WORK MAY BE SUBCONTRACTED AS NECESSARY AND AS EXPLAINED TO ME. IT IS UNDERSTOOD THAT THE FINAL INVOICED PRICE ON ESTIMATES EXCEEDING $20.00 WILL NOT EXCEED THE ESTIMATE BY $10.00 OR 10% WHICHEVER IS LESS, WITHOUT MY APPROVAL. IN THE EVENT I DO NOT AUTHORIZE COMPLETION OF A JOB OR SERVICE ONCE WORK HAS COMMENCED, A CHARGE MAY BE IMPOSED FOR DISASSEMBLY, REASSEMLY OR PARTIALLY COMPLETED WORK.

CUSTOMER Robert Flynn May 26 1999

PARTS	
LABOR	
TAX	
TOTAL	

4 x 4 L
P. Agent

To whom it may concern:

Sometime During the week of Aug. 2nd through Aug. 6th, Robert Flynn and an employee of Tire King/Car Merica brought in a transmission down to my shop. (Transmission Rebuild Inc.) The transmission was out of an older Chrysler product and they could not get the torque converter stabbed onto the transmission input shaft. I installed the torque converter for Mr. Flynn and he told me about the project they were working on. Mr. Flynn told me that the ~~this~~ transmission had been sitting for a long time, and he hoped that it still worked. I told him from my experince that when a transmission has set for an extended length of time that the seals would become brittle and condensation would form inside the transmission and would cause him problems later. I suggested that one of my transmission rebuilders inspect the internal parts and advise him what it needed. Mr. Flynn agreed, and told me to go ahead with the overhaul.

The transmission had internal damage and Mr. Flynn was informed of the cost of the overhaul. Transmission Rebuild Inc. rebuilt the transmission and on Aug. 13th 1999 an employee from Tire King picked up the transmission from me. The invoice was billed to Tire King. Tire King was having some trouble with the shift linkage, so I sent one of my employees to see what he could do to help. My employee spent several hours of uncompensated time trying to fix the linkage problem. Mr. Flynn called down here several times to have my man go up to Tire King and work on his car. Finally my man told Mr. Flynn to bring the car back down to Transmisson Rebuild when the car is road ready so he would not have to lay on work on it.

#3C

David R Johnson

Clegg Automotive Machine
1599 West Center
Orem, Utah 84058
(801) 225-7554

A FINANCE CHARGE OF 1-1/2 % per month (ANNUAL PERCENTAGE RATE 18%) made on past due accounts. Title to the property herein described, and any additions or substitutions, shall remain in the seller's name until paid in full. Purchaser agrees to pay attorney's fee, court costs and all expenses involved in the event legal action is necessary for the collection of this invoice.

E Tire King
RESS
STATE

DATE 7-20-79
CUST ORDER NO Robert Flynn
SALESMAN
637-8473

E OF UNIT 383 | CHARGE | C O D | CASH | CHECK NO 4584
PHONE NO 1-37-2755 PHONE WHEN READY YES ☐ NO ☐

PART NUMBER	SIZE	PART	LIST		NET		SERVICE	LIST		NET	
		PISTONS & PINS					HOT TANK			75	T
		RINGS					INSTALL CAM BEARINGS			15	T
		CAMSHAFT					ALIGN BORE MAINS				
		ROD BEARINGS					REBORE AND HONE			80	T
		MAIN BEARINGS					SURFACE BLOCK				
		CAMSHAFT BEARINGS					PIN FIT AND ROD ALIGN				
		CONNECTING RODS					RECONDITION RODS RC-1			40	00
		T CHAIN					MAGNAFLUX				
		T GEARS					ZYGLO				
		OIL PUMPS					CLEAN PISTONS				
		F S GASKETS					KNURL PISTONS				
		H S GASKETS					GRIND CRANKSHAFT /			40	00
		REAR MAIN SEALS					POLISH CRANKSHAFT				
		VALVES-INTAKE					RADIUS OIL HOLES				
		VALVES-EXHAUST					BALANCE ASSEMBLY				
		VALVE SEATS					VALVE JOB				
		VALVE GUIDES					SURFACE HEADS				
		VALVE SPRINGS					KNURL GUIDES				
		SHIMS					INSTALL REPLACEMENT GUIDES				
		VALVE SEALS					CUT IN GUIDE				
		FREEZE PLUGS /					INSTALL SLEEVE /			70	00
		CYL SLEEVE /			2--	00	SURFACE FLY WHEEL				
		PIN BUSHINGS					TURN DRUM OR ROTOR				
		ROD BOLTS/NUTS					REBORE BIKE CYL				
		VALVE TAPPETS					GLASS BEAD				
		C S GASKETS /					THREAD OIL LINES				
		ENGINE KIT /			1-11	33	PRESS PISTONS /			25	00
							FIT KING PINS				
							R & R BLOCK & OIL PLUGS /			15	00
							DISASSEMBLE & ASSEMBLE Std			150	00
							CUT IN SEATS				
							LABOR				
		MISC PARTS					MISC SERVICE				
TOTAL PARTS					1,36	33	**TOTAL SERVICE**			570	00

THORIZED BY

SPECIAL INSTRUCTIONS

D.A 84°C Cash
Pd 756 33 Ch

TOTAL PARTS		1-36	33
TOTAL		1136	33
TAX		R/S	

CEIVED BY

WORK

#8 d ENGINE

AL INT

0 31

9 57.60 76.14

Elsie

Have Paul(or ?) get me the following for my C300 engine

1. two heads
2. manifold and 4--carb

the heads are about 50-75$ wikth or without parts in them then fix them if needed as needed.

attached is the place to have them shipped from.

Robert Flynn 637-2755

637-6952 636-9434 637-6326

9983

BODY REPAIR PANELS, huge inventory, obsolete, current, try us. Bill's Speed Shop, 330-832-9403, Fax 330-832-2098, OH. 12/99 MA

CAR COVER CLOSEOUT. 100s below cost. $50-$125, 7 fabrics. Special orders at guaranteed lowest price. Custom tailored by world's largest manufacturer. 40,000 patterns. 909-686-2752, Fax 909-686-7245. E-mail: mark2@compuserve.com, http://www.markll.com 6/99 SK

CONVERTIBLE OWNERS: Convertible top pumps, $199.00; lift cylinders, $119.00; hose sets, $90.00. Hydraulic pumps reconditioned - call for price information. Convertible top with plastic window & pads, $199.00 & up. Boots, well liners, window motors & used parts available. Satisfaction guaranteed on all sales. MC, Visa & cash COD. Convertible Specialists, 8868 South Steed Terrace, Floral City, FL 34436, 800-272-2394 or 352-637-5505. 9/99 MA

CONVERTIBLE TOP maintenance products. Cleaner: $12.25, Sealer: $14.95. Koala International, PO Box 255, Uwchland, PA 19480, 610-458-8395. 12/99 WC

FENDER SKIRTS AND outside sunvisors new, used, originals, reproductions, bubbles, cruisers, teardrops, metal and fiberglass. Big Jim's, Box 174, Whitney, TX 76692, 254-694-5830, fax 254-694-6880. www.BigJims.net 9/99 JR

HEADLINERS 1920'S-90'S CARS & TRUCKS, NEW IN BOXES $75 AND UP. VISA/MC. HEADLINER MART 408-978-5103. 8/99 JL

INTERIORS, any auto, lowest prices, free samples. See before you buy. Walston, 37435 Porter, Box 2230, Lucerne Valley, CA 92356, phone/fax 760-248-7345. 10/99 KD

SPRINGS, NEW: most Chrysler, Dodge, Plymouth models/years; coils from $45 pr.; leafs from $110 pair; shackles, u-bolts, bushings - rubber and poly; front end parts and kits. Paper catalog available or see our website catlog at www.espo.com ESPO Springs'n Things 800-903-9019, 717-672-5413, PA. 9/99 JL

TEXAS ACRES. ONE OF TEXAS LARGEST SUPPLIER OF USED PARTS FOR CHRYLSER CORPORATION VEHICLES. 1-800-667-2764, 254-698-4555 OR FAX 254-698-4393. TEXAS ACRES, 1130 F.M.-2410, HARKER HEIGHTS, TX 76548. WWW.TEXASACRES.COM 12/99 MA

TRANSMISSION PARTS: We stock parts for automatics from 1940 - 1965, and standard shift from 1933 - present. We offer quality, dependable service and have for more than 25 years. Northwest Transmission Parts. 800-327-1955. 8/99 KD

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JOIN THE BUICK CLUB OF AMERICA... and enjoy membership with other Buick enthusiasts. BCA has over 10,000 members worldwide. Send a self-addressed stamped envelope to the address below or call for more information about the Buick Club of America. Buick Club of America, PO Box 401927T, Hesperia, CA 92340-1927. Phone: 760-947-2485, Fax 760-947-2465. Visa, M/C, Discover. 4/2000 WC

RANCHEROS, COURIERS, FALCON SEDAN DELIVERIES. JOIN THE CLUB FOR YOU. THE RANCHERO CLUB-OT, 1339 BEVERLY RD., PORT VUE, PA 15133. 12/99 CN

CORVAIR

ARIZONA SALVAGE YARD PARTING 32 Corvairs. Very reasonable prices. Call Desert Valley 800-905-8024. 8/99 KD

CORVAIR ARIZONA RUST FREE PARTS: WE PROUDLY OFFER FULLY ILLUSTRATED CATALOGS WITH OVER 4000 USED PARTS. WE ARE COMMITTED TO CUSTOMER SATISFACTION. VISA AND M/C ALWAYS WELCOME. TO ORDER CATALOGS SEND $3 TO SOUTHWEST CORVAIR, 140 E. RAYMOND, PHOENIX, AZ 85040, 602-268-5968. 9/99 JR

DISCOUNT CORVAIR PARTS. Before you buy somewhere else, give us a call. We offer lowest prices on all Corvair parts. New, used, repro and rebuilt. Mechanical, interior, exterior, wiring, trim, books and more. Over 21 years of fast same day service. Credit cards welcome. Ask for your free newsletter of our giant catalog only $5 or COD for $9. Corvair Underground, PO Box 339, Dept. OCT, Dundee, OR 97115, 1-800-825-VAIR, www.corvairunderground.com 9/99 JO

CORVETTE

1953-98 FREE BRAKE & SUSPENSION CATALOG for all Corvettes, Camaros, GM trucks and SUVs. Call 800-237-9991, Fax 813-347-4818, write to Vette Brakes & Products, Inc., 7490-30th Ave., North St. Petersburg, FL 33710, www.vettebrakes.com 8/99 JR

'63 - '65 GM FIBERGLASS PARTS. Drum Sand Spindle $45. '72 - '73 seat belts, lots more. argoftw@aol.com. 305-253-1374. 8/99 DM

'68 CORVETTE ENGINE BLOCK 427/435 HORSEPOWER, 3 Duece motor $2,500. '66 model Chevrolet engine blocks 396/325 horsepower $700. '69 model square port heads $1,200. 828-758-7042. 9/99 DM

A GREAT FIND! All your Corvette manuals and literature with one free call. Factory 800-58-CORVETTE, 8:30am PT 2/2000 WC

A-1 SEXI COOLED YOU!! 1984-'96 Corvette glass tops, original factory tops. New, $600. 516-799-8661. http://www.weruleatwhatwedo.com 3/2000 JO

ARIZONA CORVETTE PARTS 1966-92, PARTS@20THSTREETAUTO.COM, 1-800-999-4911. 10/99 CN

AUTOMATIC TRANSMISSION rebuild kits and hard parts. ASC, PO Box 255, Uwchland, PA 19480, 610-458-8395. 12/99 WC

CAR COVER CLOSEOUT. 100s below cost. $50-$125, 7 fabrics. Special orders at guaranteed lowest price. Custom tailored by world's largest manufacturer. 40,000 patterns. 909-686-2752, Fax 909-686-7245. E-mail: mark2@compuserve.com. http://www.markll.com 8/99 SK

FEBRUARY 18th, 2000

TO WHOM IT MAY CONCERN;

THE WORK ON ROBERT FLYNN'S TRANSMISSION (CONTRACTED OUT THROUGH TRANSMISSION REBUILD), FOR
HIS 1964 CHRY. WAS PAID IN FULL BY TIRE KING ON OCTOBER 1st, 1999.

THANK YOU!!

TIRE KING

WE (TRANSMISSION REBUILD) RECEIVED PAYMENT IN FULL FOR THE WORK DONE ON THIS TRANSMISSION.

Manager

TRANSMISSION REBUILD

CK# 4893

#8 F TR Receipt

CHIARA LAW OFFICES

98 North 400 East
P. O. Box 955
Price, UT 84501
Telephone: (435) 637-7011
Fax: (435) 636-0138

KEITH H. CHIARA
SAMUEL P. CHIARA

September 27, 1999

Mr. Robert Flynn
1265 No. Carbonville Rd.
Price, Utah 84501

RE: Removal of Automobile from Tire King

Mr. Flynn:

I have been asked to represent Tire King to recover all amounts still owed by you for labor, services and parts to Tire King.

I assume that you are unaware that your removal of the repaired Chrysler from Tire King's possession is a violation of Utah Criminal Code, Section 76-6-404.

To avoid civil or criminal legal action against yourself, either return the Chrysler to Tire King's possession until you pay the remainder of the bill, or simple pay Tire King the $2,354.05 you still owe.

If you do not act promptly, I will take whatever legal action is necessary to require you to pay your obligation and see that you obey the law.

Sincerely,

Keith H. Chiara

Keith H. Chiara
Attorney at Law

KCH/hp

#8.9 letter to defendant 27 Sept 99 D 35

Letterheads/Letter to Robert Flynn re Tire King rtf

CHIARA LAW OFFICES

98 North 400 East
P. O. Box 955
Price, UT 84501
Telephone: (435) 637-7011
Fax: (435) 636-0138

KEITH H. CHIARA
SAMUEL P. CHIARA

November 4, 1999

Mr. Robert Flynn
1265 No. Carbonville Rd.
Price, Utah 84501

RE: Tire King and your letter in response

Mr. Flynn:

Perhaps you kept your car on Tire King's property "free of charge" as you claim. However, Tire King is not now charging you for parking there. You are being charged for parts and labor and Utah law makes it illegal for you to remove the automobile without the consent of Tire King and Paul Pugliese until you have paid the bill.

You claim work listed on the bill sent to you was not approved by you, yet you were the one who personally delivered your transmission to Clegg. You authorized Paul to do the rest of the work on that bill, as well.

I have given you time to pay. You have not complied. I have reviewed the facts with the County Attorney (without mentioning any names) and he agrees that the removal of the automobile from Tire King's lot is felony theft.

Pay the bill immediately. Don't leave the state with that automobile and don't bother to send any letters. Simply go to Tire King and pay the bill or suffer the consequences.

Yours truly,

Keith H. Chiara

Keith H. Chiara
Attorney at Law

KCH/hp

0 36

Letterheads/Letter to Robert Flynn re Tire King2 rtf.

IRE KING
35 EAST MAIN
RICE, UTAH 84501
301) 637-8473

CAR MERICA®

Robert Flynn
ADDRESS 12165 North Carbonville Rd#9
CITY Price STATE Ut ZIP CODE 84501
PHONE CONTACT HOME PHONE

SERVICE REQUESTED Deposit $2500.00 Balance $2354.05
Car was removed before Bill was paid (Removed by Robert)

VISUAL INSPECTION ONLY

BRAKE SYSTEM

	Rotor	Mfg Spec	Actual	Accept-able	Recom-mend	Position	Drum	Rotor	Mfg. Spec	Actual	Accept-able	Recom-mend
						RR						
						LR						

	Est-mated Per Cent Worn	Acceptable	Recommend	Rear	Est mated Per Cent Worn	Acceptable	Recommend
	%			Pads/Linings	%		
				Caliper/Cyl			
				Hardware			
				Bearing/Seal			
)				Brake Hose(s)			

STEERING SYSTEM

VENTIONAL SUSPENSION			MACPHERSON SUSPENSION		
	Accept-able	Recom-mend		Accept-able	Recom-mend
			Strut Assembly		
			Bearing Repack		
R Outer			Rack & Pinion Assembly		
R Inner			Rack & Pinion Mounting Bushings		
. Outer			Tie Rod End R Outer		
. Inner			Tie Rod End R Inner		
e R L			Tie Rod End L Outer		
			Tie Rod End L Inner		
			Bellows Boot R L		
ck			Alignment Check		
ck			Shocks		

DRIVE SYSTEM

rive	Acceptable	Recommend	Rear Wheel Drive	Acceptable	Recommend
			Front U-Joint		
			Rear U-Joint		
			Transmission Mount		

TIRES

Speed Rating
Less than 2/32 Treac Depth s llegal in Many States

Visible Damage	Acceptable Tire Tread Depth in 32nds of an inch	Recommend Trade In	Recommend Replace
	12 · 11 · 10 · 9 · 8 · 7 · 6	5 · 4 · 3	2 · 1
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	12 · 11 · 10 · 9 · 8 · 7 · 6	5 · 4 · 3	2 · 1
	12 · 11 · 10 · 9 · 8 · 7 · 6	5 · 4 · 3	2 · 1

#8 h Bill sent

QTY	UNIT PRICE	PARTS DESCRIPTION	
	Blazer	Labor on Blazer	48.00
	Buick	Windshield + State + Inspection	134.40
5		G78-14 Classic White Walls @ 88.00	440.00
		Check to Clegg Automotive	736.33
		[redacted] Tranny from Transmission Rebuild	767.23
		Heads (Used 2 Resurface)	295.06
15	hr.	Labor to Remove + Disassemble Engine	720.00
10.2	hours	Labor to Install Long Block	489.60
		Valley Pan Set	68.09
		Tranny Fluid, Oil, Filter	43.93
5.6	hours	Labor to R+R Left Hand Head / Remove Piston	268.80
5	hours	Labor to Remove and Replace Tranny	240.00
		Starter From Ted's	38.00
		V-Belt, P.V.C., Air Filter, Fuel Filter,	
		Upper + Lower Rad Hose, Cap, Rotor, Plugs,	206.81
		Plug Wires, Fuel Pump + Water Pump	
		Intake Man. Gasket Set, Thermostat w/ Gasket	32.33
		Fee for Person to pick up Engine at Clegg's	50.00
			4568.52
		PARTS	
		LABOR	
		TAX	285.53
		TOTAL	4854.05

YOU ARE ENTITLED BY LAW TO THE RETURN OF ALL PARTS REPLACED EXCEPT THOSE WHICH ARE TOO HEAVY OR LARGE, AND THOSE REQUIRED TO BE SENT BACK TO THE MANUFACTURER[illegible] WARRANTY WORK O[illegible]ARE ENTITLED TO INS[illegible]OT BE RETURNED TO Y[illegible]

REPAIRS MADE BY

X

X

PLAINTIFF'S EXHIBIT
EXHIBIT NO. #2
CASE NO. 0007-120
DATE REC'D IN EVIDENCE 9/7/2000
CLERK JO

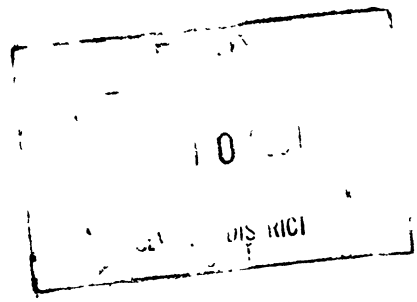
THE INDEPENDENT DEALER NAMED ABOVE IS AUTHORIZED BY ME TO PERFORM THE DESCRIBED SERVICES AND REPAIRS, INCLUDING REPLACEMENT OF NECESSARY PARTS. DEALER OR HIS EMPLOYEES MAY OPERATE VEHICLE FOR INSPECTION, TESTING OR DELIVERY AT MY RISK. WORK MAY BE SUBCONTRACTED AS NECESSARY AND AS EXPLAINED TO ME. IT IS UNDERSTOOD THAT THE FINAL INVOICED PRICE ON ESTIMATES EXCEEDING $20.00 WILL NOT EXCEED THE ESTIMATE BY $10.00 OR 10% WHICHEVER IS LESS, WITHOUT MY APPROVAL. IN THE EVENT I DO NOT AUTHORIZE COMPLETION OF A JOB OR SERVICE ONCE WORK HAS COMMENCED, A CHARGE MAY BE IMPOSED FOR DISASSEMBLY, REASSEMLY OR PARTIALLY COMPLETED WORK.

CUSTOMER

ROBERT FLYNN III.

DEFENDANT

1265 No Carbonville Rd. #92
Price, Ut 84501



IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

Tire King Inc. Plaintiff, vs. Robert Flynn 1265 No Carbonville Rd. #92 Price, Ut. 84501 Defendant.	ANSWER TO COMPLAINT Civil No 000700120

DEFENDANT complains of Plaintiff, and alleges as follows:

1. The Plaintiff, doing goods and, services on the Defendant on or after March 1999 through September 1999, had failed to provide all and adequate services to Defendant, resulting in (1)Misues of $2500.00 given to Plaintiff on or about July 1999, (2)forfeitures of all agreement, for said goods and services.

2. That in good faiths said monies were given by Defendant for any an all goods and services then or after.

3. That no written agreements as claimed by Plaintiffs Complaints were in fact in force on or until Defendant recovered properly possessions of his properties.

4. Defendant has explained in EXHIBIT A to Sheriff's question on or about November 99 about all such matters furnishing therein the $$ details of monies used or actually agreed, and erroneuous totals demanded by Plaintiff.

Def. Flynn ANSWER #9

DATED the 11th day of February, 2000

* Vincent

CARBON COUNTY SHERIFF'S OFFICE
VOLUNTARY STATEMENT FORM

NE: ROBERT FLYNN DATE OF BIRTH: JUNE 26 1942
RESS: 265 NO CARBONVILLE RD #92 PHONE: 637-2755

upplement information from Robert Flynn for case 992078 as given to etective Vincent.

ased on our discussions, I Robert Flynn, have given true statements as to he exact reasons under considerations, for removal of my vehicle (C 300 - 1964) from the premises of Tire King Muffler (Price) :

EASON: I saw the immenant possibility as of Sept 12 SATURDAY/SUNDAY of danger to leave my vehicle at TIRE KING because I realized just before that time of the deceptive and possibly fraudulent nature of the financial arrangements going on in regards to my car being worked on there.

THE FRAUD AND DECEPTIONS

1. I realized on or about August 15 1999 that monies I had given TIRE KING as deposites from JUNE/JULY (2500.00$) was potentially not being paid properly to the man(Greg) for his labor. Greg came to my home rightly or not, in August to explain this issue to me in his own way. I gave him an extra 100.00$ at that time but he was asking for other monies for his work.

continued. page 2

SS TO SIGNATURE

Robert Flynn
SIGNATURE

+ Variant

CARBON COUNTY SHERIFF'S OFFICE
VOLUNTARY STATEMENT FORM

E: ROBERT FLYNN DATE OF BIRTH: _____
RESS: _____ PHONE: _____

FRAUD AND DECEPTIO

2. The end bill (Dated Sept 20 1999) is perhaps deception on TIRE KINGS part. NOTGIVEN TO ME

a. Monies(780.00 about) was placed on the bill (transmissions repairs) by TIRE KING taking $$ away from Greg(labor)

b. (ther totals (example CleggAuto in OLEM) were for warranty billings only, not for me to pay (TIRE KING knew this)

c. (amounts 2a/2b) were actually denied on /about Aug 10 payments told to TIRE KING then to allow complete payments of all TIRE KING's bills. Thus generating an issue of nonpayments for which my car could be liened Facts hidden from me by TK

3. TIRE KING would not give me receipts, bills, or statements of any accountabilty against my deposite of 2500.00

3a Paul(owner) insisted this was based on trust between us two.

3b Monies for the (2a) item were still in my bank(ZIONS PRICE) when the trust fell apart as of AUGUST 1999 because of matter above becoming known to me otherwise as, hidden from me, I became worried and potentially endangered financially. Thus the actions that I took

SS TO SIGNATURE

SIGNATURE Robert Flynn ROBERT FLYNN

0 08

Keith H. Chiara, #0621
CHIARA LAW OFFICES
98 North 400 East
Price, Utah 84501
Telephone: (435) 637-7011
Attorney for Plaintiff

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR

CARBON COUNTY, STATE OF UTAH

Tire King, Inc., a Utah Corporation, **Plaintiff,** **vs.** **Robert Flynn** **1265 North Carbonville Rd.,** **Price, Utah 84501,** **Defendant.**	**VERIFIED COMPLAINT** **Civil No.:** 000700120 **Judge:** Bryner

COMES NOW the Plaintiff and complains against Defendant as follows:

1. The amount in controversy is less than $10,000.00.

2. Plaintiff is a Utah corporation in good standing, with its principal place of business at Price, Carbon County, Utah.

3. The Defendant is a resident of Carbon County, Utah.

4. The agreement between the parties, the services, personal property and labor were provided by Plaintiff to Defendant in Carbon County, Utah.

5. Defendant and Plaintiff entered an agreement for Plaintiff to provide services and auto parts for automobiles owned by Defendant in March, 1999 and ending in September, 1999.

#10 Complaint.

6. Defendant presently owes a remaining balance of $2,354.05 to Plaintiff for parts, labor and services.

7. Defendant removed his Chrysler from Plaintiff's place of business without paying the remaining balance or without the Plaintiff's consent, although by Utah State law, Plaintiff had a possessory lien on the automobile.

8. Plaintiff has demanded payment and Defendant has refused to pay the same.

WHEREFORE, Plaintiff prays for judgment against Defendant in the amount of $2,354.05, together with pre-judgment and post-judgment interest as allowed by law, together with costs and a reasonable attorney's fee as authorized by law.

DATED this 7 day of February, 2000.

Keith H. Chiara
Attorney for Plaintiff

VERIFICATION

STATE OF UTAH)
: ss.
COUNTY OF CARBON)

PAUL PUGLIESE, an authorized agent of Tire King, Inc., being first duly sworn upon his oath deposes and says that he has read the foregoing Verified Complaint, and understand the contents thereof, and the same is true of his own knowledge, information and belief.

Keith H. Chiara, #0621
CHIARA LAW OFFICES
98 North 400 East
Price, Utah 84501
Telephone: (435) 637-7011
Attorney for Plaintiff

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR
CARBON COUNTY, STATE OF UTAH

Tire King, Inc., a Utah Corporation, **Plaintiff,** **vs.** **Robert Flynn,** **Defendant.**	**RESPONSE TO DEFENDANT ROBERT FLYNN'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** **Civil No.: 000700120** **Judge: Bryce K. Bryner**

Defendant has not filed a motion to dismiss, but Plaintiff feels obligated to respond to Defendant's memorandum to avoid the possibility the Defendant's pleadings will be treated as a motion that Plaintiff has failed to respond to.

Plaintiff, by and through its attorney, Keith H. Chiara, responds to Defendant's Memorandum in Support of Motion to Dismiss as follows:

1. Denied. Defendant signed the initial work order and submitted several written instructions to either Tire King's owner or secretary to perform certain labor or repairs or acquire parts for the various vehicles he brought to be repaired.

#11 Response to mem. re Dismiss

2. Denied. Plaintiff's complaint is based upon an ongoing agreement, continuing instructions and agreements on continued or additional work requested by Defendant, and substantial work provided with Defendant's knowledge and approval.

3. Denied. Defendant signed a work order in May, 1999 and gave written instructions and verbal instructions authorizing work throughout the period of time referred to in the complaint.

4. Defendant's 4th paragraph simply refers to his previous answers to allegations to yet be proven at trial and does not justify a dismissal without trial.

5. Defendant's "Motion to Dismiss" and Memorandum in Support is a rehash of his defense to Plaintiff's Complaint. However, its filing forces Plaintiff to respond or face the possibility the Court will treat the memorandum as a Motion and grant the motion in the absence of a Response.

The filing by defendant, both the act and substance is without merit and not brought in good faith as is Defendant's defense and answer, and Plaintiff is entitled to all costs and attorney's fees in bringing this action and responding to this "Motion to Dismiss" and Memorandum, as proved by U.C.A. 78-27-56.

WHEREFORE Plaintiff requests that Defendant's "Motion to Dismiss" and Memorandum in support be dismissed and Plaintiff be awarded its costs and attorney's fees.

DATED this 28 day of February, 2000.

Keith H. Chiara

Keith H. Chiara
Attorney for Plaintiff

Civil/Tire King Response to Defendant's Memorandum in Support.doc

CERTIFICATE OF MAILING

I, the undersigned, certify that on the 28th day of Feb., 2000, mailed a true and correct copy of the foregoing RESPONSE TO DEFENDANT ROBERT FLYNN'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, first class, postage prepaid, to the following:

Mr. Robert Flynn
1265 North Carbonville Road, #92
Price, Utah 84501

Secretary

Civil/Tire King Response to Defendant's Memorandum in Support doc

order of the court,[4] in the absence of a statute compelling some other disposition of such cases.[5] Within the second group are (1) continuances granted with the consent of both parties,[6] (2) continuances granted by a court on its own motion,[7] and (3) continuances granted on the application of one of the parties. The majority of cases considered in this discussion fall in the last-mentioned class.

§ 2. Power and duty of court.

Independent of statute and as an incident to their authority to hear and determine causes, courts have power to grant continuances in the furtherance of justice.[8] While the grounds for continuance[9] are now largely provided by statutes,[10] some of which are held to make the granting of a continuance mandatory under certain circumstances,[11] the inherent right of courts to determine the order of trials and to direct the method of their management in the administration of justice gives way only to the clear mandate of a constitutional provision or legislative enactment,[12] and a peremptory statute may be held binding on the court only insofar as its provisions do not represent an attempt to destroy the principle of separation of powers and encroach upon the court's discretionary powers.[13] As thus limited, the constitutionality of such a statute

4. Ferguson v Sabo, 115 Conn 619, 162 A 844, cert den 289 US 734, 77 L ed 1482, 53 S Ct 595.

5. When a cause has been noted for trial pursuant to uniform rule for dismissal for want of prosecution, the trial court has no power to grant a continuance of the matter, except on application, notice, and hearing to all parties, unless the same is by stipulation, and then only by an order made of record; a case so noted is automatically placed in the assignment, and unless it is tried or continued by proper order of court during that term, it is to be dismissed. Talbot v Talbot (Iowa) 122 NW2d 456.

6. Virginia Beach Bus Line v Campbell (CA4 NC) 73 F2d 97, cert den 294 US 727, 79 L ed 1258, 55 S Ct 637.

Practice Aids.—Stipulation for continuance. 6 AM JUR PL & PR FORMS 6:571, 6:604–6:606.

7. Waite v State, 169 Neb 113, 98 NW2d 688.

As to power of court in such respect, see § 2, infra.

8 Ransom v Sipple Truck Lines, Inc. (DC Iowa) 52 F Supp 521; State ex rel. Buck v McCabe, 140 Ohio St 535, 24 Ohio Ops 552, 45 NE2d 763.

As to continuance or adjournment of a proceeding before an administrative agency, see 2 Am Jur 2d, ADMINISTRATIVE LAW § 426.

9. See generally §§ 5–42, infra.

10. English v Dickey, 128 Ind 174, 27 NE 495; Hubler v Pullen, 9 Ind 273; McCormick v Rusch, 15 Iowa 127; Tassey v Church, 4 Watts & S (Pa) 141.

A statutory provision that trial of any criminal case except for a crime punishable by imprisonment for life may be postponed by the court, or the case continued if justice will be thereby promoted, does not preclude by implication a continuance in any event of cases in which the offense charged is punishable by imprisonment for life. State v Slorah, 118 Me 203, 106 A 763, 4 ALR 1256.

11. Hall v St. Paul Mercury Indem. Co. (La App) 86 So 2d 751; Mueller v Burchfield, 359 Mo 876, 224 SW2d 87, 13 ALR2d 153; Mora v Ferguson, 145 Tex 498, 199 SW2d 759; King v State, 160 Tex Crim 556, 273 SW2d 72, 49 ALR2d 1071; Hudgins v Hall, 183 Va 577, 32 SE2d 715; Rosenberger v Commonwealth, 159 Va 953, 166 SE 464 (counsel in state senate).

A continuance may be a matter of right where the affidavit conforms to the statute and there is nothing to indicate want of proper diligence or any reason to suspect that the application is for delay. Hyde v State, 16 Tex 445.

12. Kiefer v Board of County Comrs. 7 Ohio Dec 31, 4 Ohio NP 282.

13. McConnell v State, 227 Ark 988, 302 SW2d 805; Kyger v Koerper (Mo) 207 SW2d 46 (concurring opinion).

Construction of a statute which would deprive the court of its power to determine from the evidence whether cause for continuance exists in a given case would render it unconstitutional. Johnson v Theodoron, 324 Ill 543, 155 NE 481.

A statute purporting to make the granting of a continuance mandatory if a party's attorney is serving as a member of the legislature is unconstitutional, since, insofar as it attempts to deprive the courts of the power to determine whether a continuance should be granted or denied, it is an attempt by the

#A copy §2/3

has been upheld.[14] Similarly, the express legislative intent that provisions of a statute for a continuance, based on the attendance of a party or his attorney upon the legislature, be deemed mandatory and not discretionary, has also been approved on the theory that by encouraging members of the legal profession to engage in legislative service without being forced to surrender part of their practice such a statute promotes the public interest and welfare, and is not invalid as enlarging the legislator's constitutional privileges and immunities.[15]

In the absence of any statutory restriction, the court may order a continuance upon its own motion,[16] although its failure to do so is generally not a ground for complaint.[17] Futhermore, a continuance relating back may be

legislature to destroy the principle of separation of powers and encroaches upon the powers of the courts. Booze v District Court of Lincoln County (Okla Crim) 365 P2d 589.

Limiting the time of continuances allowed nonresidents to 90 days, while the time allowed resident defendants rests solely in the discretion of the court, unconstitutionally deprives the nonresidents of the equal protection of the laws. State ex rel. Cronkhite v Belden, 193 Wis 145, 211 NW 916, 214 NW 460, 57 ALR 1218, ovrld on other grounds Sorrenson v Stowers, 251 Wis 398, 29 NW2d 512.

14. The courts must uphold and support the legislative branch in its attempt to make certain of its ability to function properly by providing for all members to be present, unless the attempt, as shown by the legislative enactment, is a clear invasion of the judicial field, and a statute providing that all pending litigation should stand continued where the attorney representing either of the litigants is a member of the legislature, when motion to that effect is made by such member, is not only reasonable but necessary for the proper functioning of the legislature. Brooks v Pan American Loan Co. (Fla) 65 So 2d 481.

15. Mora v Ferguson, 145 Tex 498, 199 SW2d 759.

Statutory provision for mandatory continuance upon application of a member of the legislature who is a party or attorney for a party to an action does not violate constitutional provisions for the division of the powers of government. Government Services Ins. Underwriters v Jones (Tex) 368 SW2d 560.

16. State ex rel. Clark v Bailey, 99 Mont 484, 44 P2d 740; Curry v McCaffery, 47 Mont 191, 131 P 673; Young v Patton, 9 Or 195 (continuance to procure papers material to meritorious defense).

The trial court did not err in continuing the case on its own motion, to allow plaintiff an additional week in which to produce evidence, such action lying within the judicial discretion of the court. Fleming v Jarrett (Mun Ct App Dist Col) 102 A2d 303.

Where a single witness was produced by each party, and there were no facts or circumstances in evidence to make the testimony of one more credible than that of the other, the court could continue the case on its own motion, over the defendant's objection, in order to give plaintiff the opportunity to call as witnesses certain persons named during the trial. Pierce Pub Co. v Hasselgren Studios, 192 Ill App 347 (abstract).

A continuance on the court's own motion, to allow the state to produce additional testimony, although objected to by the defendant, was not an abuse of judicial discretion. Waite v State, 169 Neb 113, 98 NW2d 688.

In an action for divorce, the court may, after hearing, decline to grant a divorce, and of its own motion continue the case with a view to possible reconciliation of the parents and the future welfare of the children, and may not be compelled by extraordinary writ to proceed to judgment. Foster v Redfield, 50 Vt 285.

17. Smith v Bulman, 197 SC 357, 15 SE2d 635.

There was no abuse of discretion in permitting counsel for defendant to withdraw from the case on the day set for trial, and in proceeding with the trial without granting a continuance on the court's own motion to procure other counsel, where the defendant had ample notice of the intention of counsel to withdraw, where there did not appear to be a meritorious defense to the action, and where the court questioned the defendant, looking to his further representation, but was given negative answers. Jones v Green, 74 Cal App 2d 223, 168 P2d 418.

No duty rests upon the court to grant a continuance sua sponte to allow an accused time to employ substitute counsel and prepare his defense, where accused requested discharge of his court-appointed attorney 5 days before trial and made no effort thereafter to secure the counsel, and court had warned accused that it would not appoint other counsel, the court having found that the attorney had worked diligently and there was no justifiable cause for his discharge. People v Robinson, 27 Ill 2d 289, 189 NE2d 243.

Where the record failed to disclose whether at the time of trial accused was or was not in such poor physical condition that a trial would operate to his substantial prejudice or endanger his life or health, the trial court did not err in proceeding with the trial without ordering a continuance on its own initiative. Shetsky v State (Okla Crim) 290 P2d 149.

entered, in some circumstances, to effect the purpose of justice.[18] On the other hand, a court's arbitrary postponement of a trial, over the protests of an accused, may entitle the latter to a dismissal of the indictments against him, on the ground that his constitutional right to a speedy trial has been denied him.[19] And a court which may not refuse to exercise its jurisdiction may not accomplish the same result by granting an indefinite continuance.[20] Moreover, public policy demands that in the interest of the prompt and efficient administration of justice a trial once entered upon should be proceeded with from day to day until it is concluded, unless the exigencies of the cause or the public interest imperatively require a reasonable adjournment.[1]

§ 3. Discretion of court.

By statute, a continuance when requested upon certain specified grounds may be a matter of right.[2] But in the absence of such a statutory provision or such a statutory construction, the rule is universally recognized that the granting or refusal of a continuance rests in the discretion of the court to which the application is made, and its ruling thereon, in the absence of an abuse of discretion, will be upheld on review.[3] On the other hand, and in line with the

Where the court, in effect, invited a motion for continuance to allow time for taking certain depositions, but no such motion was made, there was no abuse of discretion in proceeding to trial on the merits. Zapon Co. v Bryant, 156 Wash 161, 286 P 282.

18. Sheppard v Wilson, 6 How (US) 260, 12 L ed 430

19. See CRIMINAL LAW (1st ed § 136).

20. Leet v Union P R Co 25 Cal 2d 605, 155 P2d 42, 158 ALR 1008, cert den 325 US 866, 89 L ed 1986, 65 S Ct 1403, holding that a state court in which an action under the Federal Employers' Liability Act has been brought against a railroad company in respect of an accident in another state is without discretion to grant an indefinite continuance, on the ground that prolonged absences of defendant's employees from their duties while testifying as witnesses in a distant state will impede the war effort

1. The Plow City (CA3 Pa) 122 F2d 816, cert den 315 US 798, 86 L ed 1199, 62 S Ct 579, holding that it was an abuse of judicial discretion on the part of the trial court to subject the trial of a case to no less than four adjournments, one for 3 months and one for 5 months, thereby consuming some 9 months in a trial which ought not to have required 10 days, where none of the adjournments were requested by counsel and witnesses were available for a speedy hearing of the case.

However, the action of a trial judge in trying a divorce case on three successive Saturdays was upheld, the reviewing court stating that it was regrettable that the case was tried on separate Saturdays, and that trials, if possible, should be conducted in continuous sequence from day to day; but that such matters, under the law, were distinctly within the sound discretion of the presiding judge, and unless the record disclosed that the party complaining was prejudiced thereby, a reviewing court would not disturb the judgment. Dursa v Dursa (App) 78 Ohio L Abs 498, 150 NE2d 306.

2. § 2, supra.

3. Avery v Alabama, 308 US 444, 84 L ed 377, 60 S Ct 321; Frohwerk v United States, 249 US 204, 63 L ed 561, 39 S Ct 249; Hardy v United States, 186 US 224, 46 L ed 1137, 22 S Ct 889; Goldsby v United States, 160 US 70, 40 L ed 343, 16 S Ct 216; Moyer v United States (CA4 W Va) 206 F2d 57, 39 ALR2d 1098; United States v Pacific Fruit & Produce Co (CA9 Wash) 138 F2d 367; Neufield v United States, 73 App DC 174, 118 F2d 375, cert den 315 US 798, 86 L ed 1199, 62 S Ct 580; American Rubber Corp. v Jolley, 260 Ala 600, 72 So 2d 102, 67 ALR 2d 489; Hunter v State, 43 Ariz 269, 30 P2d 499; Silas v State, 232 Ark 248, 337 SW2d 614, cert den 365 US 821, 5 L ed 2d 698, 81 S Ct 705; People v Northcott, 209 Cal 639, 289 P 634, 70 ALR 806; Ryall v Sears, 155 Cal App 2d 36, 317 P2d 100, 67 ALR2d 472; State v McLaughlin, 126 Conn 257, 10 A2d 758; Clinton v State, 53 Fla 98, 43 So 312; Shepherd v State (Fla App) 108 So 2d 191; Bird v State, 142 Ga 596, 83 SE 238; Finch v Wallberg Dredging Co. 76 Idaho 246, 281 P2d 136, 48 ALR2d 1150; Chicago Land Clearance Com v Darrow, 12 Ill 2d 365, 146 NE2d 1, 68 ALR2d 532; People v Crump, 5 Ill 2d 251, 125 NE2d 615, 52 ALR2d 831; Mack v State, 203 Ind 355, 180 NE 279, 83 ALR 1319; State v One Certain Automobile, 237 Iowa 1024, 23 NW 2d 847; Leinbach v Pickwick-Greyhound Lines, 138 Kan 50, 23 P2d 419, 92 ALR 1; St Matthews v Smith (Ky) 266 SW2d 317; State v Jackson, 134 La 599, 64 So 481; Lakine v Brown (La App) 125 So 2d 684; Cunningham v Long, 125 Me 494, 135 A 193, Peddersen v State 223 Md 329, 164 A2d 539; Commonwealth v Henley, 337 Mass

principle that the court must not abuse its discretion in this respect, it has been frequently pointed out that the court's discretionary power must be exercised in a sound and legal manner, and not arbitrarily or capriciously,[4] and a court may not, therefore, refuse a continuance, if properly requested, where the ends of justice clearly require it to be granted.[5] If an abuse of discretion clearly appears, the ruling will be reversed.[6]

384, 149 NE2d 608, 66 ALR2d 222, cert den 358 US 850, 3 L ed 2d 85, 79 S Ct 79, Tierney v Coolidge, 308 Mass 255, 32 NE2d 198, 132 ALR 1349, Baker v Connolly Cartage Corp 239 Minn 72, 57 NW2d 657, Funderburk v State, 219 Miss 596, 69 So 2d 496, 42 ALR2d 1221; State v Temple, 194 Mo 237, 92 SW 869, Harms v Simkin (Mo App) 322 SW2d 930, Dean v Carter, 131 Mont 304, 309 P2d 1032, Cox v State, 159 Neb 811, 68 NW2d 497, 66 ALR2d 293, Phillips v State, 157 Neb 419, 59 NW2d 598, 58 ALR2d 1141; Fidelity & Casualty Co v Angier, 59 NM 191, 281 P2d 149, Re Smith, 69 ND 437, 288 NW 235, Burdick v Mann, 60 ND 710, 236 NW 340, 82 ALR 1443, Davis v Shigley, 88 Ohio App 423, 45 Ohio Ops 217, 100 NE2d 261, Beck v Peard, 183 Okla 195, 80 P2d 614, Shetsky v State (Okla Crim) 290 P2d 149, Benson v Madden, 206 Or 427, 293 P2d 733, State v Blount, 200 Or 35, 264 P2d 419 44 ALR2d 711, cert den 347 US 962, 98 L ed 1105 74 S Ct 711, Anderson v Guerrein Sky Way Amusement Co 346 Pa 80, 29 A2d 682 144 ALR 1258, Commonwealth v Snow, 178 Pa Super 319, 116 A2d 283, Strzebinska v Jary, 78 RI 496, 193 A 747, 112 ALR 391, State v Lytchfield, 230 SC 405, 95 SE2d 857 66 ALR2d 263, State v Pirkey, 22 SD 550, 118 NW 1042, Barrett v State 190 Tenn 366, 229 SW2d 516, 18 ALR2d 789, Ayers v Duprey, 27 Tex 593, Hammett v State, 34 Tex Crim 635, 209 SW 661, 4 ALR 347, Lacks v Commonwealth, 182 Va 318 28 SE2d 713, Chamberlin v Chamberlin, 44 Wash 2d 689, 270 P2d 464, 68 ALR2d 457 Mullens v Frazer, 134 W Va 409, 59 SE2d 694, 74 ALR2d 380, Gunnison v Kaufman, 271 Wis 113, 72 NW2d 706, 56 ALR2d 642, McKinney v State, 3 Wyo 719, 30 P 293

Annotation: 39 ALR2d 1321, § 4, 42 ALR 2d 1230, § 2, 47 ALR2d 1059, § 2, 48 ALR 2d 1158, § 2, 49 ALR2d 1076, § 2[b], 56 ALR2d 650, 66 ALR2d 235, § 3, 66 ALR2d 270, § 3, 66 ALR2d 300, § 2, 67 ALR2d 279, § 2[a], 67 ALR2d 500, § 3, 68 ALR2d 589, § 5, 68 ALR2d 540, 112 ALR 594, 610 31 ALR 323, 324, 10 L ed 2d 1289

Since the lower court is apprised of the circumstances of the case and the previous proceedings, it is therefore in a better position to decide on the propriety of granting the application than the appellate court Neven v Neven, 38 Nev 541, 148 P 354, 54 P 78

The rule that continuances rest in the sound discretion of the trial judge, subject to review only for abuse of discretion, upon appeal, has been held not applicable to courts of justices of the peace for the reason that upon appeal to the Circuit Court, such cases are tried there de novo Cardin v Poe, 199 Miss 809, 25 So 2d 459, Generally as to continuance and postponement of proceedings before a justice of the peace, see JUSTICES OF THE PEACE (Rev ed § 82)

As to reviewability of a ruling on a motion for continuance, see 4 Am Jur 2d, APPEAL AND ERROR § 84

As to an appellate court's discretion in continuing or suspending a hearing on appeal or error see 5 Am Jur 2d, APPEAL AND ERROR § 682

4 People v Dalton 201 Cal App 2d 396, 20 Cal Rptr 51 95 ALR2d 628 (stating that continuance is addressed to a trial court's sound discretion), Chicago Land Clearance Com v Darrow, 12 Ill 2d 365, 146 NE2d 1 68 ALR2d 532, Adcock v Adcock 339 Ill App 543 91 NE2d 99

The granting of a continuance is a matter within the discretion of the trial court, and mandamus will not lie to compel the trial court to proceed to trial of an action unless the order granting continuance is so arbitrary and capricious as to constitute a clear abuse of discretion Baker v Connolly Cartage Corp 239 Minn 72 57 NW2d 657

5 Ryder v State, 100 Ga 528 28 SE 241 Maddox v State 32 Ga 581 Adcock v Adcock 339 Ill App 543, 91 NE2d 99, People v Schell, 240 Ill App 254 Chamberlin v Chamberlin, 44 Wash 2d 689, 270 P2d 464 68 ALR2d 457

The rule that the granting of a continuance is a matter for the trial judge alone cannot be invoked to deny, pending judicial settlement of a guardian's account, the trial of a suit brought by the ward for restitution against one who received from the guardian securities known by him to belong to the guardianship Tierney v Coolidge, 308 Mass 255, 32 NE2d 198, 132 ALR 1349

6 Clinton v State 53 Fla 98 43 So 312, People v Schell, 240 Ill App 254, Allen v Com 134 Ky 110, 119 SW 795, Lacks v Commonwealth, 182 Va 318, 28 SE2d 713

Annotation: 66 ALR2d 279 287 §§ 6[b], 8 66 ALR2d 321, § 8, 67 ALR2d 518 et seq, § 11 68 ALR2d 521, et seq § 12

Where a first application for continuance fully complies with an applicable statute or rule there is no presumption that a denial of such request was not an abuse of discretion Piedmont Fire Ins Co v Dunlap (Tex Civ App) 193 SW2d 853 (error ref n

entered, in some circumstances, to effect the purpose of justice.[18] On the other hand, a court's arbitrary postponement of a trial, over the protests of an accused, may entitle the latter to a dismissal of the indictments against him, on the ground that his constitutional right to a speedy trial has been denied him.[19] And a court which may not refuse to exercise its jurisdiction may not accomplish the same result by granting an indefinite continuance.[20] Moreover, public policy demands that in the interest of the prompt and efficient administration of justice a trial once entered upon should be proceeded with from day to day until it is concluded, unless the exigencies of the cause or the public interest imperatively require a reasonable adjournment.[1]

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18. Sheppard v Wilson, 6 How (US) 260, 12 L ed 430.

19. See CRIMINAL LAW (1st ed § 136).

20. Leet v Union P R Co 25 Cal 2d 605, 155 P2d 42, 158 ALR 1008, cert den 325 US 866, 89 L ed 1986, 65 S Ct 1403, holding that a state court in which an action under the Federal Employers' Liability Act has been brought against a railroad company in respect of an accident in another state is without discretion to grant an indefinite continuance, on the ground that prolonged absences of defendant's employees from their duties while testifying as witnesses in a distant state will impede the war effort.

1. The Plow City (CA3 Pa) 122 F2d 816, cert den 315 US 798, 86 L ed 1199, 62 S Ct 579, holding that it was an abuse of judicial discretion on the part of the trial court to subject the trial of a case to no less than four adjournments, one for 3 months and one for 5 months, thereby consuming some 9 months in a trial which ought not to have required 10 days, where none of the adjournments were requested by counsel and witnesses were available for a speedy hearing of the case.

However, the action of a trial judge in trying a divorce case on three successive Saturdays was upheld, the reviewing court stating that it was regrettable that the case was tried on separate Saturdays, and that trials, if possible, should be conducted in continuous sequence from day to day; but that such matters, under the law, were distinctly within the sound discretion of the presiding judge, and unless the record disclosed that the party complaining was prejudiced thereby, a reviewing court would not disturb the judgment. Dursa v Dursa (App) 78 Ohio L Abs 498, 150 NE2d 306.

2. § 2, supra.

3. Avery v Alabama, 308 US 444, 84 L ed 377, 60 S Ct 321; Frohwerk v United States, 249 US 204, 63 L ed 561, 39 S Ct 249; Hardy v United States, 186 US 224, 46 L ed 1137, 22 S Ct 889; Goldsby v United States, 160 US 70, 40 L ed 343, 16 S Ct 216; Moyer v United States (CA4 W Va) 206 F2d 57, 39 ALR2d 1098; United States v Pacific Fruit & Produce Co. (CA9 Wash) 138 F2d 367; Neufield v United States, 73 App DC 174, 118 F2d 375, cert den 315 US 798, 86 L ed 1199, 62 S Ct 580; American Rubber Corp. v Jolley, 260 Ala 600, 72 So 2d 102, 67 ALR 2d 489; Hunter v State, 43 Ariz 269, 30 P2d 499; Silas v State, 232 Ark 248, 337 SW2d 644, cert den 365 US 821, 5 L ed 2d 698, 81 S Ct 705; People v Northcott, 209 Cal 639, 289 P 634, 70 ALR 806; Ryall v Sears, 155 Cal App 2d 36, 317 P2d 100, 67 ALR2d 472; State v McLaughlin, 126 Conn 257, 10 A2d 758; Clinton v State, 53 Fla 98, 43 So 312; Shepherd v State (Fla App) 108 So 2d 494; Bird v State, 142 Ga 596, 83 SE 233; Finch v Wallberg Dredging Co. 76 Idaho 246, 281 P2d 136, 48 ALR2d 1150; Chicago Land Clearance Com v Darrow, 12 Ill 2d 365, 146 NE2d 1, 68 ALR2d 532; People v Crump, 5 Ill 2d 251, 125 NE2d 615, 52 ALR2d 834; Mack v State, 203 Ind 355, 180 NE 279, 83 ALR 1349; State v One Certain Automobile, 237 Iowa 1024, 23 NW 2d 847; Leimbach v Pickwick-Greyhound Lines, 138 Kan 50, 23 P2d 449, 92 ALR 1; St Matthews v Smith (Ky) 266 SW2d 317; State v Jackson, 134 La 599, 64 So 481; Eskine v Brown (La App) 125 So 2d 684; Cunningham v Long, 125 Me 494, 135 A 198; Pedderson v State, 223 Md 329, 164 A2d 559, Commonwealth v Hanley, 337 Mass

principle that the court must not abuse its discretion in this respect, it has been frequently pointed out that the court's discretionary power must be exercised in a sound and legal manner, and not arbitrarily or capriciously;[4] and a court may not, therefore, refuse a continuance, if properly requested, where the ends of justice clearly require it to be granted.[5] If an abuse of discretion clearly appears, the ruling will be reversed.[6]

384, 149 NE2d 608, 66 ALR2d 222, cert den 358 US 850, 3 L ed 2d 85, 79 S Ct 79; Tierney v Coolidge, 308 Mass 255, 32 NE2d 198, 132 ALR 1349; Baker v Connolly Cartage Corp. 239 Minn 72, 57 NW2d 657; Funderburk v State, 219 Miss 596, 69 So 2d 496, 42 ALR2d 1221; State v Temple, 194 Mo 237, 92 SW 869; Harms v Simkin (Mo App) 322 SW2d 930; Dean v Carter, 131 Mont 304, 309 P2d 1032; Cox v State, 159 Neb 811, 68 NW2d 497, 66 ALR2d 293; Phillips v State, 157 Neb 419, 59 NW2d 598, 58 ALR2d 1141; Fidelity & Casualty Co. v Angier, 59 NM 191, 281 P2d 149; Re Smith, 69 ND 437, 288 NW 235; Burdick v Mann, 60 ND 710, 236 NW 340, 82 ALR 1443; Davis v Shigley, 88 Ohio App 423, 45 Ohio Ops 217, 100 NE2d 261; Beck v Peard, 183 Okla 195, 80 P2d 614; Shetsky v State (Okla Crim) 290 P2d 149; Benson v Madden, 206 Or 427, 293 P2d 733; State v Blount, 200 Or 35, 264 P2d 419, 44 ALR2d 711, cert den 347 US 962, 98 L ed 1105, 74 S Ct 711; Anderson v Guerrein Sky-Way Amusement Co. 346 Pa 80, 29 A2d 682, 144 ALR 1258; Commonwealth v Snow, 178 Pa Super 319, 116 A2d 283; Strzebinska v Jary, 58 RI 496, 193 A 747, 112 ALR 391; State v Lytchfield, 230 SC 405, 95 SE2d 857, 66 ALR2d 263; State v Pirkey, 22 SD 550, 118 NW 1042; Barrett v State, 190 Tenn 366, 229 SW2d 516, 18 ALR2d 789; Ayers v Duprey, 27 Tex 593; Hammett v State, 84 Tex Crim 635, 209 SW 661, 4 ALR 347; Lacks v Commonwealth, 182 Va 318, 28 SE2d 713; Chamberlin v Chamberlin, 44 Wash 2d 689, 270 P2d 464, 68 ALR2d 457; Mullens v Frazer, 134 W Va 409, 59 SE2d 694, 24 ALR2d 380; Gunnison v Kaufman, 271 Wis 113, 72 NW2d 706, 56 ALR2d 642; McKinney v State, 3 Wyo 719, 30 P 293.

Annotation: 39 ALR2d 1321, § 4; 42 ALR 2d 1230, § 2; 47 ALR2d 1059, § 2; 48 ALR 2d 1158, § 2; 49 ALR2d 1076, § 2[b]; 56 ALR2d 650; 66 ALR2d 235, § 3; 66 ALR2d 270, § 3; 66 ALR2d 300, § 2; 67 ALR2d 479, § 2[a]; 67 ALR2d 500, § 3; 68 ALR2d 489, § 5; 68 ALR2d 540; 112 ALR 594, 610; 131 ALR 323, 324; 10 L ed 2d 1289.

Since the lower court is apprised of the circumstances of the case and the previous proceedings, it is therefore in a better position to decide on the propriety of granting the application than the appellate court. Neven v Neven, 38 Nev 511, 148 P 354, 154 P 78.

The rule that continuances rest in the sound discretion of the trial judge, subject to review for abuse of discretion, upon appeal, has been held not applicable to courts of justices of the peace for the reason that upon appeal to the Circuit Court, such cases are tried there de novo. Gardner v Price, 199 Miss 809, 25 So 2d 459, 164 ALR 532. Generally as to continuance and adjournment of proceedings before a justice of the peace, see JUSTICES OF THE PEACE (Rev ed § 82).

As to reviewability of a ruling on a motion for continuance, see 4 Am Jur 2d, APPEAL AND ERROR § 84.

As to an appellate court's discretion in continuing or suspending a hearing on appeal or error, see 5 Am Jur 2d, APPEAL AND ERROR § 682.

4. People v Dalton, 201 Cal App 2d 396, 20 Cal Rptr 51, 95 ALR2d 628 (stating that continuance is addressed to a trial court's sound discretion); Chicago Land Clearance Com. v Darrow, 12 Ill 2d 365, 146 NE2d 1, 68 ALR2d 532; Adcock v Adcock, 339 Ill App 543, 91 NE2d 99.

The granting of a continuance is a matter within the discretion of the trial court, and mandamus will not lie to compel the trial court to proceed to trial of an action unless the order granting continuance is so arbitrary and capricious as to constitute a clear abuse of discretion. Baker v Connolly Cartage Corp. 239 Minn 72, 57 NW2d 657.

5. Ryder v State, 100 Ga 528, 28 SE 246; Maddox v State, 32 Ga 581; Adcock v Adcock, 339 Ill App 543, 91 NE2d 99; People v Schell, 240 Ill App 254; Chamberlin v Chamberlin, 44 Wash 2d 689, 270 P2d 464, 68 ALR2d 457.

The rule that the granting of a continuance is a matter for the trial judge alone cannot be invoked to deny, pending judicial settlement of a guardian's account, the trial of a suit brought by the ward for restitution against one who received from the guardian securities known by him to belong to the guardianship. Tierney v Coolidge, 308 Mass 255, 32 NE2d 198, 132 ALR 1349.

6. Clinton v State, 53 Fla 98, 43 So 312; People v Schell, 240 Ill App 254; Allen v Com. 134 Ky 110, 119 SW 795; Lacks v Commonwealth, 182 Va 318, 28 SE2d 713.

Annotation: 66 ALR2d 279, 287, §§ 6[b], 8; 66 ALR2d 321, § 8, 67 ALR2d 518 et seq., § 11; 68 ALR2d 521, et seq., § 12.

Where a first application for continuance fully complies with an applicable statute or rule, there is no presumption that a denial of such request was not an abuse of discretion. Piedmont Fire Ins. Co. v Dunlap (Tex Civ App) 193 SW2d 853, error ref n r e.

78-24-5. Subpoena defined.

The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents or other things under his control which he is bound by law to produce in evidence.

History: L. 1951, ch. 58, § 1; C. 1943 Supp., 104-24-5.

Cross-References. — Criminal investigations, power of prosecuting officers to issue subpoenas, § 77-22-2.

Indigent defendant's witnesses subpoenaed at public expense, § 21-5-14.

Subpoenas in civil cases generally, Rules of Civil Procedure, Rule 45

COLLATERAL REFERENCES

Am. Jur. 2d. 81 Am. Jur. 2d Witnesses § 9.

C.J.S. - 97 C.J.S. Witnesses § 19 et seq.

A.L.R. — Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R.3d 1373.

Who has possession, custody, or control of corporate books or records for purposes of order to produce 47 A.L.R.3d 676.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 A.L.R.3d 636.

Key Numbers. — Witnesses ⇦ 8.

78-24-6. Duty of witness served with subpoena.

A witness served with a subpoena must attend at the time appointed with any papers under his control required by the subpoena, and answer all pertinent and legal questions; and unless sooner discharged, must remain until the testimony is closed.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-6.

COLLATERAL REFERENCES

Am. Jur. 2d. 81 Am. Jur. 2d Witnesses §§ 68, 75-78.

C.J.S. — 97 C.J.S. Witnesses § 2 et seq.

Key Numbers. - Witnesses ⇦ 8.

78-24-7. Liability to forfeiture and damages.

A witness disobeying a subpoena shall, in addition to any penalty imposed for contempt, be liable to the party aggrieved in the sum of $100, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-7.

Cross-References. - Acts and omissions constituting contempt, § 78-32-1

person in contempt for violating a restraining order it is not necessary that he have knowledge of the exact words used in the order Knowledge of its substance and meaning is sufficient And it has been held that the service of a restraining order upon a party charges him with knowledge of its provisions sufficiently to hold him in contempt for violating them[3] A person may be adjudicated in contempt of court for violating an order of which he has actual notice, notwithstanding that at the time of violation the order has not been formally drawn up[4]

There is an exception to the general rule that a permanent party to an injunction cannot be charged with contempt for violating the injunction in the absence of service upon him of the injunctional order or proof that he had actual knowledge thereof Where the decree of injunction is not only in personam against the defendants in the injunction suit but also operates in rem against specific property or rather against a given title to such property, the decree is a limitation upon the use of the property of which all subsequent owners, lessees or occupants must take notice In such a case the decree, if broad enough in its terms to enjoin all persons is sufficient as a public record to impart constructive notice to all persons[5] Thus, actual knowledge or notice of the injunction order is not necessary to convict for contempt a subsequent tenant or occupant who although he is not a party to the injunction suit, violates an injunction restraining the defendants and all other persons whomsoever from maintaining a liquor nuisance in a certain building since the injunctional decree being of record is a restriction in the nature of an encumbrance upon the use of the building of which all subsequent owners, tenants or occupants thereof must take notice at their peril[6] Also no person with knowledge of the terms of an injunction even if not a party to the suit can aid or cooperate with a party in doing the prohibited act without becoming guilty of contempt if the injunction is so drawn as to restrain not only the parties to the action but also their attorneys, agents or employees[7]

§ 42 Effect of error or invalidity.

A contempt proceeding based on the violation of a court order has been said not to open to reconsideration the legal or factual basis of the order so as to result in a retrial of the original controversy The basis of this rule is said to be the fact that the procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience[8] Nevertheless it is frequently declared that the disobedience of an order made without or in excess of jurisdiction is not punishable as contempt[9] In other language it is said that a contempt to be void

3 Harriet Cotton Mills v Textile Workers Union of America, NC, 48 LRRM 2179, 41 CCH Lab Cas ¶ 67,019, 17 Am Jur 2d Contempt § 40

4 Belden v Stott, 130 Ohio St 393, 199 NE 2d 568

5 State v Porter, 76 Kan 77

6 Silvers v Traverse, 8 Ind App 1, 34 NE 1105

Annotation: 15 ALR 99

7 State ex rel Coleman v Justus, 71 Ohio App 11

Annotation: 1 ALR 2d 1290

A private citizen though not a party to a judgment ousting a city from the exercise of the unwarranted power of his suit the sale of intoxicating liquors and enjoining all municipal officers as agents from engaging in the exercise of such power was guilty of contempt where he attempted to defeat the purpose of the judgment with knowledge thereof State ex rel Coleman v Justus, supra

8 McGrath v Kristensen, 340 US 162, 95 L Ed 162, 71 S Ct 224

9 Ex parte Grove, 3 Ind App 3, 29 NE 129, Ohio v Superior Court, 99 Cal App 2d 1, 220 P 2d 1

#C
§42
Contempt

order.[10] One court has declared that if a court should go so clearly and so far outside its jurisdiction as to act, not as a court, but as a usurper, its order would be void, would bind no one, and could be disregarded by anyone with impunity.[11] The fact that an order goes beyond the findings on which, alone, it is based has been said to constitute an excuse in contempt proceedings based on its violation.[12]

A charge of voidness of the allegedly violated order, as distinguished from a mere charge of erroneousness, may be raised in a collateral proceeding for contempt.[13] Thus, there is authority that if a party to whom an order is addressed wishes to contest its validity, he may refuse to obey and, in a prosecution for contempt, show, in defense, that the court had no authority to make the order.[14] And it appears that lack of jurisdiction or power of the court to make the order allegedly violated may be raised on appeal from a judgment of conviction for contempt.[15]

It seems that an absence of jurisdiction may be shown not only where the court rendering the judgment or order on which the contempt proceeding is based had no jurisdiction of the kind or class of action, as where a court of law attempts to render a decree of specific performance, or of the subject matter or res or the parties involved in the particular suit or action, but also, at least under many circumstances, where the court, though enjoying all the foregoing jurisdictional prerequisites, attempts to make a particular order that transcends its power or authority, as where a court in an action on a money demand attempts to commit the defendant to prison.[16]

Sometimes it is said that an order issued by a court with jurisdiction over the subject matter and over the person must be obeyed until it is reversed, modified, or set aside by orderly and proper proceedings,[17] and that a court's power to decide includes the power to decide wrongly.[18] Consequently, where the court has jurisdiction over the subject matter and the parties and has the

218, 104 NE 387; McHenry v State, 91 Miss 562, 44 So 831; St. Louis, K. & S. R Co. v Wear, 135 Mo 230, 36 SW 357, 658; Robertson v Commonwealth, 181 Va 520, 25 SE2d 352, 146 ALR 966 (stating that there is vast difference between judgment that is void and one that is merely erroneous).

10. Hernreich v Quinn, 350 Mo 770, 168 SW2d 1054.

Annotation: 12 ALR2d 1067, § 3

A divorced husband could not be held in contempt for not complying with orders that were void as constituting attempted modification of interlocutory judgment that had become final Grant v Superior Court of San Francisco, 214 Cal App 2d 15, 29 Cal Rptr 125.

11. Maddin Industries, Inc. v Associated Transport, Inc 45 Tenn App 329, 323 SW2d 222, cert den 361 US 865, 4 L ed 2d 104, 80 S Ct 117.

12. Gulick v Hamilton 293 Ill 126, 127 NE 383, 9 ALR 1629.

13. State v Lew, 25 Wash 2d 264, 172 P2d 289.

The question of the validity of an original order may be raised in a collateral proceeding for contempt where the question relates to the jurisdiction of the court. McHenry v State, 91 Miss 562, 44 So 831; Simon Piano Co v Fairfield, 103 Wash 206, 174 P 457

A person charged with contempt is at liberty to defend his disregard of the court's order by showing that it was void for lack of jurisdiction. Mayer v Mayer (Sup) 36 Del Ch 457, 132 A2d 617

14. Carden v Ensminger, 329 Ill 61, 161 NE 137, 58 ALR 1256

15. Re Kramer (ND) 75 NW2d 203

16. See Brougham v Oceanic Steam Navigation Co. (CA2) 205 F 857; Brady v Superior Ct. 200 Cal App 2d 69, 19 Cal Rptr 242, Rudd v Rudd, 184 Ky 400, 214 SW 791

Annotation: 12 ALR2d 1074, § 4

17. Goetz v Goetz, 181 Kan 128, 309 P2d 655.

18. Nicholas v Commonwealth, 180 Va 215, 42 SE2d 306.

A court that has jurisdiction over the subject matter and the parties, and the power to render a particular order or decree may expect obedience Saenz v Sanders Tex Civ App) 241 SW2d 316.

authority to render a particular order or decree, the fact that such order or decree, violation or disobedience of which is made the basis of the contempt charge, is erroneous or irregular or improvidently rendered does not justify a person in failing to abide by its terms. His conduct in failing to do so may be punished as for contempt despite the error or irregularity.[19] Where the court has jurisdiction of the parties and of the subject matter, and the legal authority to make an order, the order, even though erroneous, has been described as "lawful," within the meaning of a contempt statute.[1]

The mere fact that an order whose violation is the basis for a contempt proceeding is not valid in all respects has been said not to preclude punishment for contempt based on violation of valid parts of the order.[2]

Courts may distinguish between civil and criminal contempts with respect to the invalidity of the allegedly violated order. Thus, it has been stated by a federal court that in criminal contempt proceedings based on the violation of a court order, the validity of that order is not open to question in the slightest degree, and that disobedience constitutes a contempt, even though the order is set aside on appeal or otherwise becomes ineffective. In contrast, a charge of civil contempt is said to fall with the violated order, if it is determined that the order was erroneously or wrongfully issued.[3]

There is authority indicating that it is contempt to disobey an order made by a court with jurisdiction of the subject matter and person regardless of the constitutionality of the legislation under which the order was made.[4]

Prohibition has been said to be proper to restrain a judge from punishing for contempt, where he is proceeding beyond the court's jurisdiction or is proceeding erroneously within its jurisdiction.[5]

§ 43. — Injunction.

It is a general rule that a person cannot be punished in contempt proceed-

19. Douds v Retail Wholesale Dept. Store Union (CA2 NY) 173 F2d 764, 9 ALR 2d 685; Securities & Exch. Com. v Okin (CA2 NY) 137 F2d 862, 148 ALR 1019; Pitcock v State, 91 **Ark** 527, 121 SW 742; People v McWeeney, 259 **Ill** 161, 102 NE 233; Burtch v Zeuch, 200 **Iowa** 49, 202 NW 542, 39 ALR 1349; Re Morris, 39 **Kan** 28, 18 P 171; Re Knaup, 144 **Mo** 653, 46 SW 151; People ex rel. Chauffman v Van Buren, 136 NY 252, 32 NE 775; Re Kramer (ND) 75 NW2d 753.

Annotation: 12 ALR2d 1107, § 41.

A contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. Maggio v Zeitz, 333 US 56, 92 L ed 476, 68 S Ct 401.

A party to whom is directed an erroneous order of a court having jurisdiction of the subject matter and the parties is under a duty to obey the order until it is set aside by the court or on appeal. Hodous v Hodous, 76 ND 392, 36 NW2d 554, 12 ALR2d 1051.

1. United Marine Div. of I. L. A. etc. v Commonwealth, 193 **Va** 773, 71 SE2d 159, cert den 344 US 893, 97 L ed 690, 73 S Ct 212.

2. Knaup, 144 **Mo** 653, 46 SW 151; Hodous v Hodous, 76 **ND** 392, 36 NW2d 554, 12 ALR2d 1051 (holding that husband's failure to comply with any portion of order for payment of temporary alimony in three different amounts constituted punishable civil contempt, although order was erroneous as to one amount, it being valid as to other two, and court having jurisdiction of parties and of subject matter); Liquor Control Com. v McGillis, 91 **Utah** 586, 65 P2d 1136; United Marine Div. of I. L. A. etc. v Commonwealth, 193 **Va** 773, 71 SE2d 159, cert den 344 **US** 893, 97 L ed 690, 73 S Ct 212.

But see Bowman Dairy Co. v United States, 341 US 214, 95 L ed 879, 71 S Ct 675, indicating that a person should not be held in contempt of court for failure to comply with a subpoena duces tecum that is bad in part.

3. Cliett v Hammonds (CA5 Tex) 305 F 2d 565.

Annotation: 12 ALR2d 1077, § 5.

4. United States v United Mine Workers of America, 330 US 258, 91 L ed 884, 67 S Ct 677.

Annotation: 12 ALR2d 1079, § 7.

5. Herr v Humphrey, 277 **Ky** 421, 126 SW 2d 809, 121 **ALR** 954.

courts to punish for contempt for disobedience of its order, a distinction may be made between the violation of a preliminary injunction or temporary restraining order preserving the status quo of the subject matter of the litigation during the pendency thereof, and final decrees of courts requiring the parties to do or not to do the things enjoined upon them by such decrees. It is held that in the latter class of cases, if the decree was rendered without jurisdiction, it can be disobeyed with impunity, for no one owes obedience to a void decree, as it is without any force whatever.[14] On the other hand it is said that a court possesses the power of hearing and determining the question of its jurisdiction, and may while so doing, require the parties to preserve the status of the subject matter, and may punish for contempt disobedience of its temporary restraining order.[15]

It seems that the mere fact that a temporary injunction could be dissolved on motion will not prevent a person from being held in contempt for violating the injunction, where no such motion is made. Thus, a person has been held in contempt for a violation allegedly occurring about two years after issuance of the temporary injunction and while it was subject to dissolution on motion.[16]

§ 44. — Subpoena.

The mere fact that an order, command, or direction of the court in the course of a trial, such as its direction to a witness then testifying to produce a document in his possession, is erroneous, is no excuse for his not complying with the order, and will not relieve him of a charge of contempt.[17] Similarly, where a justice of the peace has jurisdiction, a commitment for contempt in refusing to make an affidavit on being subpoenaed is proper, even where the affidavit could not be used in the proceeding in which it was intended to be used, since a person subpoenaed cannot refuse to answer on the ground that his evidence is not admissible.[18] However, it is only where a judge is in the proper exercise of his judicial functions that the power of contempt can be exercised; there can be no contempt, technically speaking, where there is no authority. Thus, where a magistrate purported to try a cause over which he had no jurisdiction, he was held to be without power to hold a person in contempt for refusing to testify in the cause.[19] So too, it has been held that if the subpoena or the service thereof is so defective or irregular as to impose on the proposed witness no duty to obey it, he cannot be punished for contempt for not complying with it.[20] And it has been said that a person should not be held in contempt for failure to comply with a subpoena that is bad in part.[1]

14. See United States v United Mine Workers of America, 330 US 258, 91 L ed 884, 67 S Ct 677, relying on United States v Shipp, 203 US 563, 51 L ed 319, 27 S Ct 165 (temporary restraining order); Pitcock v State, 91 Ark 527, 121 SW 742 (temporary restraining order).

Annotation: 12 ALR2d 1078, § 6.

15. Pitcock v State, 91 Ark 527, 121 SW 742.

Annotation: 12 ALR2d 1078, § 6.

16. Stringer v State, 228 Miss 387, 87 So 2d 691.

17. Robertson v Commonwealth, 181 Va 520, 25 SE2d 352, 146 ALR 966.

18. Robb v McDonald, 29 Iowa 330.

19. Piper v Pearson, 68 Mass (2 Gray) 120.

20. State v Mills, 235 La 479, 104 So 2d 428.

1. Bowman Dairy Co v United States, 341 US 214 95 L ed 879, 71 S Ct 675.

Annotation: 130 ALR 332.

But see the decisions cited in § 42, supra, indicating that a person may be subject to contempt proceedings for violating valid parts of an order which has invalid parts.

B. AMENDMENT; AIDER BY PLEADINGS

§ 21. Generally.

Defective process is of two kinds, void and voidable. When voidable merely, the defect may generally be remedied by an amendment; but when the defect is of such nature as to render the process void, it is not amendable,[6] for the reason that it is a nullity and there is nothing to amend.[7] Process which is amendable will support a judgment.[8]

Voidable process includes all defective process where the defect is of an amendable nature, and it is valid until attacked;[9] and an amendment is allowable where the process, although irregular, is sufficient to give jurisdiction—where there is enough to amend, that is, where it can be clearly determined, from the process and pleadings or papers served therewith, what was intended.[9] A void process may be divided into two classes, namely, (1) process which issues in violation of a statute prohibiting it, and (2) process which is not in substantial compliance with statutory requirements, although not prohibited by law.[10] A defect of the former kind not only cannot be amended, but cannot be cured by waiver, consent, or agreement, but a defect of the latter kind may be waived,[11] although it cannot be cured by amendment.[12]

Courts have inherent and comprehensive power over their process, and, subject to the rule that there must be something by which to amend, nearly all formal defects and clerical errors may be cured by amendment,[13] even after presentation of a plea in abatement or motion to quash.[14] However, in

6. W. T. Rawleigh Co. v Watts, 68 Ga App 786, 24 SE2d 213; Durham v Heaton, 28 Ill 264; Johnson v State, 202 Miss 233, 31 So 2d 127; Labbitt v Bunston, 80 Mont 293, 260 P 727; Sharman v Huot, 20 Mont 555, 52 P 558; Patrick v Brago, 4 NJ Super 226, 66 A2d 749; Jacobs v Queens Ins. Co. 51 SD 249, 213 NW 14; Houston Oil Co. v Randolph (Tex Com App) 251 SW 794, 28 ALR 926; Barton v Sutton, 93 Vt 102, 106 A 583; Miller v Zeigler, 44 W Va 484, 29 SE 981.

48 Mich L Rev 719 et seq.

Annotation: 154 ALR 1019, 1020.

Practice Aids.—Notice and proceedings for amendment of process. 16 AM JUR PL & PR FORMS, PROCESS, Forms 16:371 et seq.

7. W. T. Rawleigh Co. v Watts, 68 Ga App 786, 24 SE2d 213; Texas Title Guaranty Co. v Mardis, 186 Okla 433, 98 P2d 593.

Annotation: 154 ALR 1019, 1020.

8. Ex parte Howard-Harrison Iron Co. 119 Ala 484, 24 So 516; Houston Oil Co. v Randolph (Tex Com App) 251 SW 794, 28 ALR 926.

9. Chamberlain v Bittersohn (CC SC) 48 F 42 (where, in an action for trespass on land, the notice was that the plaintiff would take judgment for the relief demanded in the complaint, and the summons and complaint were served together, it was held that the process might be amended); Richmond & D. R. Co. v Benson, 86 Ga 203, 12 SE 357; Kostrob v Riley, 105 NJL 37, 143 A 863; James River Nat. Bank v Haas, 73 ND 374, 15 NW2d 442, 154 ALR 1005; Howe v Lisbon Sav. Bank & T. Co. 111 Vt 201, 14 A2d 3 (apparently holding, however, that in order for a court to allow an amendment of process, the court must be able to determine from the process itself, without the aid of any pleadings or papers served therewith, what was intended).

As to aider by complaint, petition, or declaration served with defective summons generally, see § 26, infra.

10. Howe v Lisbon Sav. Bank & T. Co., supra; Caldbeck v Simanton, 82 Vt 69, 71 A 881.

11. As to waiver of defects, see §§ 161 et seq., infra.

12. Howe v Lisbon Sav. Bank & T. Co. 111 Vt 201, 14 A2d 3.

13. Ridenbaugh v Sandlin, 14 Idaho 472, 94 P 827; Crafts v Sikes, 4 Gray (Mass) 194; Citizens' Nat. Bank v Wiswell, 88 Okla 194, 212 P 583; Cartwright v Chabert, 3 Tex 261; Brown v Cook, 77 W Va 356, 87 SE 454; Miller v Zeigler, 44 W Va 484, 29 SE 981.

The discretion of the court to permit amendment of a summons should be guided by whether the defendant was misled by the defect therein. James River Nat. Bank v Haas, 73 ND 374, 15 NW2d 442, 154 ALR 1005.

14. Parsons v Swett, 32 NH 87.

#D § 20-22

the absence of statutory authorization, process cannot be amended in substantial particulars.[15] In most jurisdictions, and particularly in the code states, there are broad general provisions authorizing the court in furtherance of justice and upon such terms as it may deem proper to amend any process.[16] The courts will not permit an amendment which is purely technical and which would tend to thwart substantial justice.[17]

On motion to amend a writ, it must be shown either on the facts or face of the writ and return, that the amended form would be proper.[18] Advancing the case to trial, after denying a motion challenging a process because of an irregularity, has been regarded as the equivalent of correcting the defect.[19]

§ 22. What defects or omissions may be cured by amendment

The primary test whether a particular defect in process may be cured by an amendment is whether that defect renders the process void or merely voidable, the latter being an amendable defect and the former not.[20] Accordingly, the effect of the omission of the signature of the clerk or his deputy from the summons which he issues, or of the plaintiff or his attorney when such signature is required, is ascertained by determining whether under the rule established in the jurisdiction such defect is a defect in a matter of substance rendering the process void or whether it merely renders the process voidable,[1] and the same test applies with regard to the effect of the omission of the seal of the court from the summons.[2] There is likewise much difference of opinion regarding the question whether defects in respect of the return day of the summons may be amended depending upon whether the court regards the defect as one which makes the process a nullity or as a defect constituting merely an irregularity.[3]

A mere irregularity in process as to form or misprision may be amended.[4] The fact that no mention is made in a summons of the filing of the complaint as prescribed by statute has been held curable by amendment.[5] It has been ruled that a writ in an action in debt which does not state the amount of

15 Fisher v Crowley, 57 W Va 512, 50 SE 422.

A statute providing that a court may permit amendments of a pleading, process or proceedings before or after judgment in furtherance of justice and on such terms as may be proper, should be construed liberally in view of code provisions that the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party and that all proceedings under the code are to be liberally construed with a view to effect its object and to promote justice. James River Nat. Bank v. Herr, 73 ND 74, 10 NW2d 442, 154 ALR 1000.

16 The Federal Rules of Civil Procedure, for example, authorize the federal courts at any time in their discretion upon such terms as may be deemed just to allow any process to be amended unless it clearly appears that material prejudice would ensue to the substantial rights of the party against whom the process issued. Rule 4(h), Fed. Rules of Civ. Proc. This rule, as pointed out in the notes of the advisory committee, substantially continues the provision made in 8 USC § 767. Byrd v. Pawlick, CA4 (NC), 67 F2d 990, 91 ALR Fed 901. As to amendment, see 91 ALR Fed 901, 536, § 7. As to construction and application of Federal Rules, see 28 USCA.

For states adopting rules similar to the Federal Rules, see Am. Jur. 2d Desk Book, Document 12.

17 Johnson v. Provincial Ins. Co., 1 Mich. 216.

18 Parker v. Baker, 4 NH

19 Jones v. Evans, 4 Vt. 4, 23 Am. Dec. 246.

20 As to defects [illegible] and amendment under Federal Rules, see [illegible].

1 [illegible]

2 [illegible]

3 [illegible]

4 Ball v. Hix, 65 So. 2d [illegible], 154 ALR 1494.

5 Cox v. Wells, 71 ND 60, 298 NW 494.

the debt may be amended on motion of the plaintiff to state in a sum certain the amount of recovery sought.[6] Where a process was signed by the plaintiff's attorney, but below his signature there appeared the word "Clerk" rather than a designation as plaintiff's attorney, such defect is curable by amendment.[7]

§ 23. — Error or omission regarding court, judge, or place of court's convening.

As a general rule, an error or omission regarding the court or judge or the place of the court's convening in a summons or other process making the writ void cannot be amended, since, being void, it is a nullity and there is nothing to amend;[8] but where such an error or omission makes the writ merely voidable and not void, the error or omission may be cured by amendment.[9] It has been stressed that a summons or other process which was voidable because of such an error or omission might be amended, provided the omission or error was not such as would be apt to mislead the person served or as would fail to give him sufficient information to enable him to comply with the process.[10] The cases appear to be uniform in regarding an error or omission in a summons or other process in naming or describing the court or judge or the place of the court's convening as curable by amendment (in case the process is voidable only), provided a complaint or petition served with the process correctly states the facts in that regard[11]

6. Camden on Gauley ex rel. Mollohan v O'Brien, 138 W Va 787, 79 SE2d 74.

7. Jones v Lavanway, 123 Vt 284, 187 A2d 346.

8. Lowrey v Richmond & D. R. Co. 83 Ga 504, 10 SE 123; Land v Christenson, 109 Neb 101, 189 NW 838; Tice v Monford, 3 NJL 633.

Annotation: 154 ALR 1019, 1020 et seq.

Designation in a summons of the wrong court has been held to be a defect that cannot be cured by amendment. Utah Sand & Gravel Products Corp. v Tolbert, 16 Utah 2d 407, 402 P2d 703 (designation of city court in action for a judgment in amount in excess of its jurisdiction).

9. Kostrob v Riley, 105 NJL 37, 143 A 863; James River Nat. Bank v Haas, 73 ND 374, 15 NW2d 442, 154 ALR 1005; Galveston, H & S. A. R. Co. v Coker (Tex Civ App) 135 SW 179, error ref.

Annotation: 154 ALR 1019, 1021 et seq

10. W T Rawleigh Co. v Watts, 68 Ga App 786, 24 SE2d 213; Kostrob v Riley, 105 NJL 37, 143 A 863; James River Nat Bank v Haas, 73 ND 374, 15 NW2d 442, 154 ALR 1005.

Annotation: 154 ALR 1019, 1021

The intervention of the statute of limitations as a bar to recovery by the plaintiff, except for the allowance of an amendment to a summons containing an error in naming the court, was considered in James River Nat Bank v Haas, supra, where the defendant, by recourse to the complaint, could have informed himself as to the court in which the action was intended to have been brought. The court, pointing out that the defendant was not losing any right which he had at the time the summons was served on him, answered in the affirmative the question as to whether it would be in furtherance of justice to permit the amendment by the court named in the complaint and which should have been named in the summons, in view of the alleged defense that such statute intervened.

11. Relfe v Valentine, 45 Ala 286; Kostrob v Riley, 105 NJL 37, 143 A 863; Sivaslian v Akulian (Sup) 166 NYS 535, James River Nat. Bank v Haas, 73 ND 374, 15 NW2d 442, 154 ALR 1005 (holding that where the naming of the court in a summons is alleged to have been a mistake of which amendment is sought, the court may, in determining in what court the action was commenced, have recourse to the complaint); Galveston, H. & S. A R. Co. v Coker (Tex Civ App) 135 SW 179, error ref

Annotation: 154 ALR 1019, 1024 et seq

Where a declaration prayed for process requiring the defendant to be and appear at the August term, and the process was dated July 16, and required the defendant "to be and appear at the City Court of Richmond County next to be holden in and for the county aforesaid on the first Monday in July" in the same year, the regular term of court being the first Monday of August, it was held that there was no error in permitting the process to be amended. Richmond & D. R. Co. v Benson, 86 Ga 203, 12 SE 357

As to aider by complaint, petition, or declaration served with defective process generally, see § 26, infra.

fictitious names. Barcelo v Brown (1979, DC Puerto Rico) 478 F Supp 646.

Summons delivered to each of two defendants directing the other defendant rather than the defendant to whom delivered to appear and answer were fatally defective, and no jurisdiction over defendants was obtained, even if both defendants did have actual notice of the lawsuit. Stone v Hicks, 45 **NC** App 66, 262 SE2d 318.

Service of process was defective where plaintiff failed to comply with the mandatory requirements of G.S. 1A-1, Rule 4(j)(1) for service of process on a sole proprietorship, and attempted service instead on defendant as an association under G.S. 1A-1, Rule 4(j)(8). Defendant, its assumed name to the contrary notwithstanding, was not an "unincorporated association" but was a sole proprietorship owned and operated by one person. The fact that that person signed the registered mail receipt and thereafter acquired actual notice of the lawsuit did not remedy the failure of plaintiff to address the complaint and summons to the owner personally as required by Rule 4(j)(1). Park v Sleepy Creek Turkeys, Inc. (1983) 60 **NC** App 545, 299 SE2d 670.

§ 18. —Misnomer; effect of incorrect name where party has been served

Case authorities:

Where, in suit to rescind contract for purchase of automobile for defects therein, confusion was caused by the use of 2 similar sounding corporate names in the printed warranty issued and service was made by certified mail upon an agent who was agent for both of the corporations, and the corporate manufacturer filed an answer setting up defenses and proceeded to a trial on the merits, trial court properly ruled that there was actual service upon the manufacturer. Eckstein v Cummins, 41 **Ohio** App 2d 1, 70 Ohio Ops 2d 10, 321 NE2d 897, later app 46 Ohio App 2d 192, 75 Ohio Ops 2d 341, 347 NE2d 549.

§ 19. —Error or omission in middle name or initial

Case authorities:

A sheriff's return of citation containing an erroneous middle initial required reversal of a default judgment based thereon. Zaragoza v De La Paz Morales (1981, **Tex** Civ App 11th Dist) 616 SW2d 295.

§ 20. Defects or omissions in copy delivered to served party

Case authorities:

In actions to recover damages for personal injuries arising out of an explosion at a manufacturing plant, plaintiffs were properly permitted to cure the defect in their service of process on one foreign corporation where the only error was plaintiffs' failure to include a notice of service on the Secretary of State together with the copy of the summons and complaint that was served on the foreign corporation, where no prejudice to the corporation was shown, and where the irregularity was properly cured nunc pro tunc by mailing the notice of service to the corporation. Orzechowski v Warner-Lambert Co. (1982, 2d Dept) 91 App Div 2d 681, 457 **NYS2d** 323.

§ 22. What defects or ommissions may be cured by amendment

Case authorities:

The absence of a monetary amount in a notice served with a summons without a complaint, which summons is timely served and adequately informs defendant of the nature of the action and the relief sought, is a correctable irregularity as against the complete absence of a notice which would be a jurisdictional defect; the notice is merely defective and the omission does not prejudice a substantial right of defendant; accordingly, the amendment of the summons was properly permitted. Premo v Cornell (1979, 3d Dept) 71 AD2d 223, 423 **NYS2d** 64.

The failure of the plaintiff, through clerical error, to attach to its complaint several exhibits (which the complaint recited were annexed to it), does not mean that the exhibits, which were furnished to defendant's counsel some five months after the action was commenced and some two months prior to plaintiff's motion for summary judgment, may not be considered upon plaintiff's motion; the court has the power to permit a mistake or omission to be corrected upon such terms as may be just, and, accordingly, the exhibits furnished to defendant's counsel are deemed annexed to and incorporated in the complaint. Research Institute of America, Inc. v Department of Taxation & Finance (1979) 99 Misc 2d 243, 415 NYS2d 928.

§ 24. —Mistake or omission in designation or description of party

Case authorities:

Under CPLR § 2001, providing that at any stage of an action the court may permit a mistake, omission, defect or irregularity to be corrected upon such terms as may be just, and CPLR § 3025(b), providing that a party may amend his pleading at any time by leave of court, plaintiffs in a medical malpractice action would be permitted to amend both their complaint and their summons so as to describe defendant as "St. Mary's Hospital of Syracuse, Inc." rather than as "St. Mary's Hospital of Syracuse" where defendant had received actual notice of plaintiffs' suit. Pinto v House (1981, 1st Dept) 79 App Div 2d 361, 436 NYS2d 733.

Complaint and summons directed to defendant named as "MICHIGAN TOOL COMPANY, A Division of Ex-Cell-O Corporation" was not service on the entity Ex-Cell-O Corporation, even if the complaint and summons reached the hands of someone obligated to receive service in behalf of Ex-Cell-O, since Ex-

§ 20-22
supplement
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Moreover, the United States Supreme Court has said that on sustaining a motion to dismiss service of process, the court having jurisdiction of the subject matter will not dismiss the suit altogether, but will only enter an order vacating the service and dismissing the party improperly served.[3]

B. Waiver

§ 161. Generally; general appearance, etc.

Waiver of objections to the process, or to the service thereof, is not limited to mere irregularities; it is well established that a party defendant may waive his right to insist upon any defect in the issuance or service of process notifying him of the suit against him, and by such waiver confer jurisdiction upon the court to proceed with the adjudication of his rights.[4] When one takes such a step in an action or seeks such relief at the hands of the court as is consistent only with the hypothesis that the court has jurisdiction of his person, he is bound by its action as fully as if he had been regularly served with process.[5] A stipulation of the parties that each of them voluntarily submits to the jurisdiction of the court without service of process, the same as if personal service had been obtained by each against the other, waives any right to assert a lack of personal jurisdiction.[6]

side the limits of his own county, should not dismiss the declaration when its sufficiency is not called into question : Hellman v Ladd, 315 **Mich** 150, 23 NW2d 244.

3. Fitzgerald & Mallory Constr. Co. v Fitzgerald, 137 **US** 98, 34 L Ed 608, 11 S Ct 36.

4. Kendall v United States, 12 Pet (**US**) 524, 9 L Ed 1181; St. Louis-San Francisco R. Co. v State, 179 **Ark** 1128, 20 SW2d 878, cert den 281 **US** 735, 74 L Ed 1150, 50 S Ct 249; Beckwith v Bailey, 119 **Fla** 316, 161 So 576; People by Kerner v United Medical Service, 362 **Ill** 442, 200 NE 157, 103 ALR 1229; Deegan v Deegan, 22 **Nev** 185, 37 P 360; Hazel v Jacobs, 78 **NJL** 459, 75 A 903; James River Nat. Bank v Haas, 73 **ND** 374, 15 NW2d 442, 154 ALR 1095.

Demanding a copy of the complaint has been held to waive the right to object to jurisdiction on the ground that such copy did not accompany the summons as required by statute, especially where the defendant made no reservation of rights in making his demand for a copy, and the copy was supplied by the plaintiff. Milwaukee County v Schmidt, Garden & Erikson, 35 **Wis** 2d 33, 150 NW2d 354.

For agreed case as waiver of objections to service of process, see 3 Am Jur 2d, Agreed Case § 24.

For submission to arbitration as a waiver of defects of process, see 5 Am Jur 2d, Arbitration and Award § 33.

5. Childs v Lauterman, 103 **Cal** 387, 37 P 382; Turner v Kooke, 173 **Ga** 396, 160 SE 398; Forrester v Forrester, 155 **Ga** 722, 117 SE 373, 29 ALR 1363; Kansas City, St. J. & C. B. R. Co. v Rodebaugh, 38 **Kan** 15, 15 P 899; Smith v Eaton, 36 **Me** 298; Hall v Young, 3 Pick (**Mass**) [illegible]; Ferguson v Oliver, 99 **Mich** 161, 58 NW [illegible]; Re Crawford, 63 **Ohio** St 58, 67 NE [illegible]; Beck v Beck, 18 **Ohio** App 105, 192 NE [illegible]; Wood v Heineman, 178 **Or** 384, 169 P2d [illegible], 171 ALR 597; Lower v Wilson, 9 **SD** 252, 68 NW 345 (holding that objection to a failure to pursue any statutory mode of service is waived by one who, by his counterclaim, subjects himself to and invokes the jurisdiction of the court by demanding an affirmative judgment, as well as by introducing evidence in support of the issues raised by his counterclaim and respondent's reply thereto).

See Restatement, Judgments § 13.

The effect of the conduct of the defendant as a waiver of any objection to service or notice has been held to be determined by the character of his acts in gross, the consideration of the court not being limited to the form of his statements. Inhabitants of Trustees of Berwick Academy, 97 **NH** 467, 92 A2d 922, 31 ALR2d 258, saying that [illegible] of an objection to service or notice [illegible] the question whether defendant has by his own conduct submitted himself to the jurisdiction of the court, and is to be determined not solely with reference to its isolated allegations, but with respect to his actions as a whole.

6. Petrowski v Hawkeye-Security Ins. Co. 350 **US** 495, 100 L Ed [illegible], 76 S Ct 496.

A defendant may waive service of process by signing an acknowledgment that he received a copy of the complaint, thereby barring an action against him on the acknowledgment, states that he waives all other and further service. Jones v [illegible] Co. 67, 76 SE2d 294, overlg Thacker [illegible], 67 **Ga** 796, 130 SE 457.

The defendant's general appearance in an action against him in a court having jurisdiction of the subject matter amounts to a waiver of the issuance of process, or of defects in the process or notice served upon him, and such appearance confers jurisdiction of his person, regardless of the fact that process was not served upon him, or that the service thereof may have been defective.[7] A general appearance which operates as a waiver of the right to object to the process or the service thereof may be entered by the attorney for the defendant, provided he has authority to make it; the existence of this authority is presumed from the fact that he entered an appearance, but the presumption is rebuttable.[8]

Service should not be deemed to have been waived unless waiver is clearly established and shown on the record.[9] Defective service is not ordinarily waived by answering over and going to trial on the merits after objecting ineffectually to the jurisdiction,[10] or by filing a petition for removal of the cause to the federal court.[11] Absence of a trial court's jurisdiction over the person of the defendant, in view of the invalidity of an attempted service of process, is not waived by his petition in a higher court for a writ of prohibition to prevent further proceedings in the trial court.[12]

§ 162. Failure to make timely objection.

Formal defects and irregularities in process or the service thereof must be taken advantage of at the first opportunity, and before any further step in the cause is taken, otherwise they will be held to have been waived;[13] but a defect which totally invalidates the writ or the service thereof is not waived by mere delay and may be taken advantage of at any time, assuming that the party does not, in the meantime, voluntarily submit himself to the jurisdiction of the court.[14]

Except where defects in the process deprive the court of the jurisdiction of a defendant's person, and he does not submit to the jurisdiction by appear-

7. See 5 Am Jur 2d, APPEARANCE §§ 6, 7.

8. See 5 Am Jur 2d, APPEARANCE § 10; 7 Am Jur 2d ATTORNEYS AT LAW §§ 112 et seq.

As to collateral attack upon judgment, based upon the ground that the attorney who entered appearance had no authority to do so, see 46 Am Jur 2d, JUDGMENTS §§ 661, 662.

9. Ex parte Cullinan, 224 **Ala** 263, 139 So 255, 81 ALR 160.

10. § 163, infra.

11. See 32 Am Jur 2d, FEDERAL PRACTICE AND PROCEDURE § 542.

12. Victory Carriers, Inc. v Hawkins, 44 **Hawaii** 250, 352 P2d 314, 92 ALR2d 239.

13. Martin v Gray, 142 US 236, 35 L Ed 997, 12 S Ct 186; Dew v Cunningham, 28 **Ala** 466; Cason v Glass Bottle Blowers Asso. 37 **Cal** 2d 134, 231 P2d 6, 21 ALR2d 1387 (holding that motions to quash the service of summons and dismiss the proceedings for a writ of mandate are properly refused where the motions are not made until the close of the trial, and the defendants have made a general appearance); Bank of Orland v Dodson, 127 **Cal** 208, 59 P 584; Beall v Blake, 13 **Ga** 217; Athens v Ernst, 342 **Ill** App 357, 96 NE2d 643; State ex rel. Davis v Webster Parish, 120 **La** 163, 45 So 47; Parsons v Swett, 32 **NH** 87; North Pacific Cycle Co. v Thomas, 26 **Or** 381, 38 P 307; Upson v Horn, 34 SCL (3 Strobh) 108; Snyder v Philadelphia Co. 54 **W Va** 149, 46 SE 366.

Annotation: 93 ALR2d 376, 404 et seq., § 6.

14. Beall v Blake, 13 **Ga** 217; Tropic Builders, Ltd. v Naval Ammunition Depot Lualualei Quarters, Inc. 48 **Hawaii** 306, 402 P2d 440 (holding that lack of service on an indispensable party may be asserted at the trial by one having an interest in the matter, though not raised by a preliminary motion); Rhodes v Oxley, 212 **Iowa** 1018, 235 NW 919; Brady v Burch, 185 **Minn** 440, 241 NW 393; Mamlin v Tener, 146 **Pa** Super 593, 23 A2d 90; Frosch v Schlumpf, 2 **Tex** 422; Ross v Fuller, 12 **Vt** 265; Kelly v Paris, 10 **Vt** 261.

Annotation: 93 ALR2d 376, 387–407, §§ 3–6 (defects in designating court or place of appearance).

As to opening or vacating a judgment because of defects in process or notice, see 46 Am Jur 2d, JUDGMENTS §§ 757 et seq.

ing generally or otherwise, his failure to raise questions with respect to the insufficiency of process in the trial court amounts to a waiver of such defects and precludes their consideration on review.[15]

§ 163. Special appearance; objecting to jurisdiction.

Objections to the process or the service thereof are not waived by a special appearance for the sole purpose of objecting to the lack of the jurisdiction of the court over the person, and of moving for the dismissal of the action on that ground.[16] The local practice may permit a defendant to attack the jurisdiction of the court over his person because of defective service, by plea in abatement, or answer in the nature thereof.[17] A question as to the validity of service of process may properly be presented by special appearance[18] and motion to quash or set aside the process or dismiss the action.[19] It has been held that a fatal defect in the original notice of an action, in failing to correctly notify the defendant of the place where the court convenes, is not rendered a mere irregularity by the filing, in the court where the petition is on file, of a special appearance to attack its jurisdiction.[20]

To test the sufficiency of the summons, the appearance must be special, of course, but it has been held not to be necessary, in a court of record, to make the plea or motion expressly state that the appearance is only for the purpose of objecting to the jurisdiction.[1] According to the practice in some jurisdictions, the defendant is permitted to assert an objection to jurisdiction, together with an objection to the merits of the plaintiff's claim, in the same answer, without waiving the objection to jurisdiction;[2] and it seems generally agreed that a party not properly served with process, so as to give the court jurisdiction of his person, does not waive the objection or confer jurisdiction by answering over and going to trial on the merits after he has objected ineffectually to the jurisdiction, provided he preserves an exception.[3] Ordinarily,

15. See 5 Am Jur 2d, APPEAL AND ERROR § 585.

16. See 5 Am Jur 2d, APPEARANCE § 9.

17. §§ 157, 159, supra.

18. McIntosh v Ponder, 222 **Ark** 701, 262 SW2d 277; Fletcher v District Court of Jefferson County, 137 **Colo** 143, 322 P2d 96; Summerlott v Goodyear Tire & Rubber Co. 253 **Iowa** 121, 111 NW2d 251, 93 ALR2d 371; Brown v Taylor, 174 **NC** 423, 93 SE 982; Sawyer v La Flamme, 123 **Vt** 229, 185 A2d 466, 98 ALR2d 548.

Annotation: 93 ALR2d 376, 378–383, § 2 [a, b] (defects in designating court or place of appearance); 98 ALR2d 551, 600 et seq., § 9 (fraud or trickery in service of process).

19. §§ 157, 159, supra.

20. Summerlott v Goodyear Tire & Rubber Co. 253 **Iowa** 121, 111 NW2d 251, 93 ALR 2d 371

1. Fisher v Crowley, 57 **W Va** 312, 50 SE 422.

2. See 5 Am Jur 2d, APPEARANCE §§ 14, 16 et seq.

3. Harkness v Hyde, 98 US 476, 25 L Ed 237; Blandin v Ostrander, CA2 NY, 239 F 700; Jones v Jones, 102 **NY** 415, 15 NE 707; Fisher v Crowley, 57 **W Va** 312, 50 SE 422.

Annotation: 98 ALR2d 551, 613 et seq., § 11 (fraud or trickery in service of process).

Defective service on the General Counsel of the National Labor Relations Board, who was served in Washington, D. C., instead of within the territorial limits of the state, as required under the Federal Rules, has been held not waived, where he objects to the jurisdiction and preserves the objection when it is overruled, although he afterward takes other steps in the proceeding, such as entering into a stipulation of facts, voluntarily complying with the judgment of the court, and filing briefs in proceedings in the same court. Hyster Road, Mix Co. v Fenton, CA7 Wis, 265 F 2d 57, 73 ALR2d 1002. Annotation: 73 ALR2d 1003, 1011, 1012, 1019, §§ 5, 7.

The benefit of exceptions to the denial of a motion to dismiss on the ground of the alleged misuse of process by fraud or trickery in its service has been held not lost where the trial court assessed damages and entered judgment against the defendant after notice that the defendant conceded liability but was proceeding under a reservation of all rights to his exceptions, and where the defendant did not intend that what he did was to operate as a waiver. Sawyer v La Flamme, 123 **Vt**

however, the defendant should not, on motion attacking the jurisdiction over his person, seek any relief in addition to the vacation of process, beyond that which is consistent with the court's lack of jurisdiction over the applicant's person.[4]

VII. RETURN; PROOF OF SERVICE

A. In General

§ 164. Generally; definition, purpose, and necessity of return. N/A

A return is defined as a short account in writing made by an officer in respect to the manner in which he has executed a writ or process;[5] it is his official statement of the acts done by him under the writ in obedience to its directions and in conformity with the requirements of law.[6] According to some decisions, the return is not simply the indorsement of the officer on the process, but is the actual filing of it in the office from which it was issued.[7] Frequently, however, in statutes, and usually in common speech, the word "return" means merely the certificate, without regard to whether it has been filed or not.[8] However this may be, the return completes the service.[9]

The return of process is essential to an effectual service thereof.[10] As a general rule, to authorize a judgment against a person who has not appeared and answered or otherwise submitted himself to the jurisdiction of the court, there must be not only service on such person, but also a legal return of such service.[11] It is not the return, however, but the service of the writ, that gives jurisdiction. The return is merely evidence by which the court is informed that the defendant has been served.[12]

In a number of cases it has been held or stated that a failure to make return of service does not render the service invalid or affect the court's jurisdiction.[13] Thus, the failure to return the summons with the proof of

229, 185 A2d 466, 98 ALR2d 548. Annotation: 98 ALR2d 551, 616, § 11.

4. See 5 Am Jur 2d, Appearance § 21.

5. Southern Kansas Stage Lines Co. v Holt, 192 **Ark** 165, 90 SW2d 473; Rowe v Hardy, 97 **Va** 674, 34 SE 625.

6. Hooper v McDade, 1 **Cal** App 733, 82 P 1116; State ex rel. Montgomery Ward & Co. v District Ct. 115 **Mont** 521, 146 P2d 1012.

7. Hogue v Corbit, 156 **Ill** 540, 41 NE 219.

8. Easton v Childs, 67 **Minn** 242, 69 NW 903.

9. Hanna v Allen, 153 **Wash** 485, 279 P 1098.

10. Love v National Liberty Ins. Co. 157 **Ga** 259, 121 SE 648.

11. Love v National Liberty Ins. Co., supra; Albright-Pryor Co. v Pacific Selling Co. 126 **Ga** 498, 55 SE 251; Hobby v Bunch, 83 **Ga** 1, 10 SE 113.

Annotation: 82 ALR2d 668–673, §§ 1–3.

12. Safeway Stores, Inc. v Ramirez, 99 **Ariz** 372, 409 P2d 292; Southern Kansas Stage Lines Co. v Holt, 192 **Ark** 165, 90 SW2d 473; Re Newman, 75 **Cal** 213, 16 P 887; Klosenski v Flaherty (**Fla**) 116 So 2d 767, 82 ALR2d 664, conformed to (**Fla** App) 117 So 2d 7; Love v National Liberty Ins. Co. 157 **Ga** 259, 121 SE 648; Call v Rocky Mountain Bell Tel. Co. 16 **Idaho** 551, 102 P 146; Mintle v Sylvester, 197 **Iowa** 424, 197 NW 305; Boyd v Chesapeake & O. Canal Co. 17 **Md** 195; Brown v Reinke, 159 **Minn** 458, 199 NW 235, 35 ALR 413; Kahn v Mercantile Town Mut. Ins. Co. 228 **Mo** 585, 128 SW 995; Burleigh v Wong Soon Leun, 83 **NH** 115, 139 A 184; Bourgeious v Santa Fe Trail Stages, 43 **NM** 453, 95 P2d 204; Hatch v Alamance R. Co. 183 **NC** 617, 112 SE 529; Rhodes v Valley Greyhound Lines, Inc. 98 **Ohio** App 187, 57 Ohio Ops 232, 128 NE2d 824; Selected Invest. Corp. v Bell, 201 **Okla** 408, 206 P2d 989; First Nat Bank v Ellis, 27 **Okla** 699, 114 P 620; Wade v Wade, 92 **Or** 642, 176 P 192, 178 P 799, 182 P 136, 7 ALR 1143; Gunter's Unknown Heirs & Legal Representatives v Lagow (**Tex** Civ App) 191 SW2d 111, error ref; Denby Truck Co. v Thompson (**Tex** Civ App) 248 SW 427; Cunningham v Spokane Hydraulic Min. Co. 20 **Wash** 450, 55 P 756.

13. Re Spiers, 32 Cal App 2d 124, 89 P2d 156; Klosenski v Flaherty (**Fla**) 116 So 2d

ant to Rule 12(b)(2) where defendant was properly served with process Brooks v dson (1979, SD NY) 478 F Supp 793

edical malpractice complaint would not missed for lack of proper service where ony of the process server, who claimed to personally served the physician in his and who gave a precise description of yout of the physician's office, was more le than the physician's unsupported de- f personal service and although the pro- erver's affidavit of service contained some racies regarding the physician's physical rance, those mistakes were readily ex- ble by the physician s admitted weight f approximately 20 pounds Kardanis v 1982, 1st Dept) 90 App Div 2d 727, 455 d 612

. Generally; general appearance, tc.

uthorities:

ection to process or service thereof are l if the defendant does not present them tion or in his answer or reply Krasnosky nosky (**Fla** App) 282 So 2d 186

nding by a trial judge that appellant had, e purpose of avoiding all legal matters, ed himself from the world and lived in on in a high security apartment, refusing wer the telephone or open his mail, was ately supported by the evidence where cord showed that genuine attempts by s methods were made to effect service him, and where appellant did not contest n officer attempted on one occasion to is residence to serve process on him, that nanswered telephone calls were made in empt to contact him, that service was pted by way of four visits to establish- that appellant was believed to frequent, nat five attempts were made to contact hrough observations carried out at his nce, under the circumstances, there was e of law which required that the officers court be able to breach appellant's self- ed isolation in order to inform him that a vas filed against him, and a judgment ig relief upon appellant's complaint to a writ of execution and levy of sale upon rty formerly owned by him would be ed Luckey v Smathers & Thompson (**Fla** 83) 343 So 2d 53

ense of inadequate service of process is d where defendant presented defenses Rule 12(b)(1) and Rule 12(b)(6) in origi- otion to dismiss, but did not object to e of process under Rule 12(b)(5) Jordan gorek (1979, ED Va) 480 F Supp 891

efendant did not waive the right to assert ff's failure to effect service of process the long-arm statute or otherwise, by an anticipatory motion to dismiss in he unsuccessfully contended that the arm provision specifically invoked could e employed as to the claim in question Jackson v Cedars of Lebanon Hospital Corp (1981, Fla App D3) 399 So 2d 542

The trial court had personal jurisdiction over the defendant and properly denied the defendant's motion to dismiss the complaint and to quash service of process for failure to serve required statutory notice with the summons since the defendant had previously served the plaintiff with a notice of appearance, which constituted a formal appearance in the action Schoonmaker v Ford Motor Co (1981, 3d Dept) 79 App Div 2d 1067, 435 NYS2d 393

§ 163. Special appearance; objecting to jurisdiction

Case authorities:

An order granting defendant s motion to dismiss for lack of jurisdiction over the person was reversed and the case remanded to the trial court under the rule that an appearance challenging personal jurisdiction is a general appearance which waives defects in service and subjects the defendant to the jurisdiction of the court, where, although the defendant was not served, defendant's counsel had filed a "Notice of Appearance ' and had later moved to dismiss the complaint this was so even though the rule applied had been enunciated subsequent to the dismissal of the instant action Viator v Morgan Constr Co (**Fla** App) 344 So 2d 657

Upon a special appearance at which defendant moved to quash service of process, the trial court erred in failing to conduct an evidentiary hearing on the sufficiency of substituted service of process, before such motion to quash can be granted, defendant must establish the invalidity of such service by clear and convincing evidence The Travelers Ins Co v Davis (1979, **Fla** App D3) 371 So 2d 702

§ 164. Generally; definition, purpose, and necessity of return

Practice aids: Return of service—On person in possession or change of property that is subject matter of action in rem—Service of copies of complaint and order directing absent nonresident defendant to appear or plead [28 USCS § 1655, FRCP 4(e)] 1 Fed Proc Forms § 1 781

Case authorities:

Where defendant had actual notice of pendency of action, failure to promptly file official return of service did not invalidate service and court had personal jurisdiction Coronet Ins Co v Jones (1977) 45 **Ill** App 3d 232, 3 Ill Dec 909, 359 NE2d 768

Where there was no question as to whether return had to be filed, fact that preparation and filing of return had been entrusted to attorney did not operate as justification or excuse for failure to file United States v Kroll (1977, CA7 Wis) 547 F2d 393

In paternity action trial court erred in dismissing mother's complaint due to asserted lack of jurisdiction by reason of lack of return

#161—163 supplemented

OFFICE OF
CARBON COUNTY SHERIFF
PRICE, UTAH

February 18, 2000

SHERIFF'S RETURN ON SUBPOENA

STATE OF UTAH,)
: ss.
County of Carbon)

I hereby certify that on the THE 18TH DAY OF FEBRUARY 2000, A.D., I served the within Subpoena....on the within PAUL PUGLIESE at PRICE by reading in HIS presence and hearing.

JAMES CORDOVA
Carbon County Sheriff

By W.R. CRAIG, DEPUTY

Base Fees: $ 6.00
Mileage: 1.00
Total: 7.00 (PAID)
Civil Number: 24462

#F
SUBPOENA

RECEIVED
FEB 17 2000
24462/287 ID
CARBON COUNTY SHERIFF

Name Bar Number
Robert Flynn
Address
1265 No carbonville rd
City, State ZIP
Price Ut. 84501
Telephone
Attorney for the defendant (Pro Per)

IN THE SEVENTH DISTRICT COURT, STATE OF UTAH
CARBON COUNTY ✓

Tire king corp., Plaintiff,

v.

Robert Flynn, Defendant.

SUBPOENA

Case No. 000700120 ✓

TO: PAUL PUGLIESE OWNER TIRE KING

YOU ARE COMMANDED:

order 1 →

[X] to appear in the seventh district ✓ Court at the place, date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):

1. Plaintiffs bill to defendant dated 9-20-99

2. Dates of payments of transmission to TRI, % [777 E Main, Price UT]

3. The original verified agreement of defendant with Tire King Inc (Complaint, item 5)

[ ] to permit inspection of the following premises at the date and time specified below.

PLACE DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other person who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Utah Rules of Civil Procedure.

Dennis Olson DATE: 2-17-00
CLERK OR ATTORNEY FOR PLAINTIFF/ DEFENDANT

0 64

In compliance with the Americans with Disabilities Act individuals needing special accommodations (including communicative aids and services) during this proceeding should call 1-800-992-0172, at least THREE working days prior to the scheduled proceeding.

NOTICE TO PERSONS SERVED WITH A SUBPOENA

Subpoena to Appear at Trial, at Hearing, or at Deposition

1. If this subpoena commands you to appear to give testimony at trial or at hearing, you must appear in person at the place designated in the subpoena.

2. If this subpoena commands you to appear to give testimony at deposition, you must appear in person at the place designated in the subpoena. If you are a resident of Utah, the subpoena may command you to appear only in the county where you reside, or where you are employed, or where you transact business in person, or where the court orders you to appear. If you are not a resident of Utah, the subpoena may command you to appear only in the county where you are served with the subpoena, or where the court orders

3 If this subpoena commands you to appear to give testimony at trial at hearing, or at deposition, but does not command you to produce or to permit inspection and copying of documents or tangible things, or inspection of premises, you have the right to object if the subpoena:

(i) imposes an undue burden or expense upon you;

(ii) does not allow you a reasonable time to comply, which may be less than 14 days, depending on the circumstances, or

(iii) commands you to appear at deposition at a place in violation of paragraph 2, above

4 To object to complying with the subpoena, you must file with the court issuing the subpoena a motion to quash or modify the subpoena. You must comply with the subpoena unless you have obtained a court order granting you relief from the subpoena

Subpoena to Produce or to Permit Inspection of Documents or Tangible Things or to Permit Inspection of Premises

5. If this subpoena commands you to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises but does not command you appear to give testimony at trial, at a hearing, or at a deposition:

(i) you need not appear in person at the place of production or inspection;

(ii) you must produce documents as you keep them in the ordinary course of business or organize and label them to correspond with the categories demanded in the subpoena; and

(iii) you need not make any copies or advance any costs for production, inspection or copying. If you agree to make copies, the party who has served the subpoena upon you must pay the reasonable costs of production and copying.

6 You have the right to object if the subpoena:

(i) imposes an undue burden or expense upon you;

(ii) does not allow you at least 14 days to comply, unless the party serving the subpoena has obtained a court order requiring an earlier response;

(iii) requires you to disclose a trade secret or other confidential research, development or commercial information;

(iv) requires you to disclose privileged communication with your attorney or privileged trial preparation materials; or

(v) requires you to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from expert's study made not at the request of any party.

7. To object to a subpoena for one of the reasons stated in paragraph 6, you must provide notice in writing of your objection to the party or attorney serving the subpoena before the date specified in the subpoena for you to respond. If your objection is based on either paragraph 6(iii), 6(iv), or 6(v), your written objection must describe the nature of the documents, communications or things that you object to producing with sufficient specificity to enable the party or attorney serving the subpoena to contest your objection. You must also comply with the subpoena to the extent that it commands production or inspection of materials to which you do not object.

8 After you make timely written objection, the party who has served the subpoena upon you must obtain a court order to compel you to comply with the subpoena. The party must give you a copy of its motion for a court order and notice of any hearing before the court. You have the right to file a response to the motion with the court and a right to attend any hearing. After you make a timely written objection, you have no obligation to comply with the subpoena until the party serving the subpoena has served you with a court order that compels you to comply

9 If this subpoena commands you to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises *and* to appear to give testimony at trial, at a hearing, or at a deposition, you may object to the production or inspection of documents or tangible things, or inspection of premises, by following the procedure identified in paragraph 7 Even though you object to production or inspection of documents or tangible things, or inspection of premises, you must appear in person at the trial, at the hearing or at the deposition unless you obtain an order of the court by following the procedures identified in paragraph 4.

NOTICE TO PERSONS SERVED WITH A SUBPOENA

Subpoena to Appear at Trial, at Hearing, or at Deposition

Order #2 → (1) If this subpoena commands you to appear to give testimony at trial or at hearing, you must appear in person at the place designated in the subpoena.

2. If this subpoena commands you to appear to give testimony at deposition, you must appear in person at the place designated in the subpoena. If you are a resident of Utah, the subpoena may command you to appear only in the county where you reside, or where you are employed, or where you transact business in person, or where the court orders you to appear. If you are not a resident of Utah, the subpoena may command you to appear only in the county where you are served with the subpoena or where the court orders.

3. If this subpoena commands you to appear to give testimony at trial, at hearing, or at deposition, but does not command you to produce or to permit inspection and copying of documents or tangible things, or inspection of premises, you have the right to object if the subpoena:

(i) imposes an undue burden or expense upon you;

(ii) does not allow you a reasonable time to comply, which may be less than 14 days, depending on the circumstances, or

(iii) commands you to appear at deposition at a place in violation of paragraph 2, above.

Order #2 → (4) To object to complying with the subpoena, you must file with the court issuing the subpoena a motion to quash or modify the subpoena. You must comply with the subpoena unless you have obtained a court order granting you relief from the subpoena.

Subpoena to Produce or to Permit Inspection of Documents or Tangible Things or to Permit Inspection of Premises

5. If this subpoena commands you to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises but does not command you appear to give testimony at trial, at a hearing, or at a deposition:

(i) you need not appear in person at the place of production or inspection,

(ii) you must produce documents as you keep them in the ordinary course of business or organize and label them to correspond with the categories demanded in the subpoena; and

(iii) you need not make any copies or advance any costs for production, inspection or copying. If you agree to make copies, the party who has served the subpoena upon you must pay the reasonable costs of production and copying.

6. You have the right to object if the subpoena:

(i) imposes an undue burden or expense upon you;

(ii) does not allow you at least 14 days to comply, unless the party serving the subpoena has obtained a court order requiring an earlier response;

(iii) requires you to disclose a trade secret or other confidential research, development or commercial information;

(iv) requires you to disclose privileged communication with your attorney or privileged trial preparation materials; or

(v) requires you to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from expert's study made not at the request of any party.

7. To object to a subpoena for one of the reasons stated in paragraph 6, you must provide notice in writing of your objection to the party or attorney serving the subpoena before the date specified in the subpoena for you to respond. If your objection is based on either paragrapn 6(iii), 6(iv), or 6(v), your written objection must describe the nature of the documents, communications or things that you object to producing with sufficient specificity to enable the party or attorney serving the subpoena to contest your objection. You must also comply with the subpoena to the extent that it commands production or inspection of materials to which you do not object.

8. After you make timely written objection, the party who has served the subpoena upon you must obtain a court order to compel you to comply with the subpoena. The party must give you a copy of its motion for a court order and notice of any hearing before the court. You have the right to file a response to the motion with the court and a right to attend any hearing. After you make a timely written objection, you have no obligation to comply with the subpoena until the party serving the subpoena has served you with a court order that compels you to comply.

9. If this subpoena commands you to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises, *and* to appear to give testimony at trial, at a hearing, or at a deposition, you may object to the production or inspection of documents or tangible things, or inspection of premises, by following the procedure identified in paragraph 7. Even though you object to production or inspection of documents or tangible things, or inspection of premises, you must appear in person at the trial, at the hearing or at the deposition unless you obtain an order of the court by following the procedures identified in paragrapn 4.

OFFICE OF
CARBON COUNTY SHERIFF
PRICE, UTAH 84501

TIRE KING, INC.

PLAINTIFF

SHERIFF'S RETURN ON:
SUMMONS & COMPLAINT
Case #: 000700120

ROBERT FLYNN

DEFENDANT

I, James Cordova, Sheriff of the County of Carbon, State of Utah, hereby certify that I received the within SUMMONS & COMPLAINT on THE 9TH DAY OF FEBRUARY 2000, and personally served the same upon ROBERT FLYNN at 1265 N CARBONVILLE RD, PRICE, in the County of Carbon on THE 9TH DAY OF FEBRUARY 2000, by delivering to and leaving with said ROBERT FLYNN a copy of SUMMONS & COMPLAINT with my name, signature and official title endorsed thereon, together with, as to the defendant.

Dated at Price, County of Carbon, State of Utah, this February 10, 2000.

James Cordova
Carbon County Sheriff

By Edward L Ellis
EDWARD L ELLIS, CORRECTIONS OFFICER

Civil #: 24315
Service Fee: $ 6.00
Mileage: 3.00
Total: 9.00

Rule 45. Subpoena.

(a) *Form, issuance.*

(1) Every subpoena shall:

(A) issue from the court in which the action is pending;

(B) state the title of the action, the name of the court from which it is issued, the name and address of the party or attorney serving the subpoena, and its civil action number;

(C) command each person to whom it is directed to appear to give testimony at trial, or at hearing, or at deposition, or to produce or to permit inspection and copying of documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of Notice to Persons Served with a Subpoena, in substantially similar form to Form 30 in the Appendix of Forms to these rules.

(2) A command to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises, may be joined with a command to appear at trial, or at hearing, or at deposition, or may be issued separately.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(b) *Service; scope.*

(1) Generally.

(A) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made as provided in Rule 4(e) for the service of process and, if the person's appearance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered. Prior notice of any commanded production or inspection of documents or tangible things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(B) Proof of service when necessary shall be made by filing with the clerk of the court from which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(C) Service of a subpoena outside of this state, for the taking of a deposition or production or inspection of documents or tangible things or inspection of premises outside this state, shall be made in accordance with the requirements of the jurisdiction in which such service is made.

(2) Subpoena for appearance at trial or hearing. A subpoena commanding a witness to appear at a trial or at a hearing pending in this state may be served at any place within the state.

(3) Subpoena for taking deposition.

(A) A person who resides in this state may be required to appear at deposition only in the county where the person resides, or is employed, or transacts business in person, or at such other place as the court may order. A person who does not reside in this state may be required to appear at deposition only in the county in this state where the person is served with a subpoena, or at such other place as the court may order.

(B) A subpoena commanding the appearance of a witness at a deposition may also command the person to whom it is directed to produce or to permit inspection and copying of documents or tangible things relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 30(b) and paragraph (c) of this rule.

2d(4)(B)(ii)(C)

(4) Subpoena for production or inspection of documents or tangible things or inspection of premises. A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises may be served at any time after commencement of the action. The scope and procedure shall comply with Rule 34, except that the person must be allowed at least 14 days to comply as stated in subparagraph (c)(2)(A) of this rule. The party serving the subpoena shall pay the reasonable cost of producing or copying the documents or tangible things. Upon the request of any other party and the payment of reasonable costs, the party serving the subpoena shall provide to the requesting party copies of all documents obtained in response to the subpoena.

(c) *Protection of persons subject to subpoenas.*

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court from which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A subpoena served upon a person who is not a party to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises, whether or not joined with a command to appear at trial, or at hearing, or at deposition, must allow the person at least 14 days after service to comply, unless a shorter time has been ordered by the court for good cause shown.

(B) A person commanded to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear at trial, at hearing, or at deposition.

(C) A person commanded to produce or to permit inspection and copying of documents or tangible things or inspection of premises may, before the time specified for compliance with the subpoena, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the documents or tangible things or inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance;

(ii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or requires a non-resident of this state to appear at deposition in a county other than the county in which the person was served;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies;

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information;

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party;

(iii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or

(iv) requires a non-resident of this state who is not a party to appear at deposition in a county other than the county in which the person was served;

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) *Duties in responding to subpoena.*

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to appear or produce at a place not within the limits provided by subparagraph (c)(3)(A)(ii).

(f) *Procedure where witness conceals himself or fails to attend.* If a witness evades service of a subpoena, or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(g) *Procedure when witness is confined in jail.* If the witness is a prisoner confined in a jail or prison within the state, an order for examination in the prison upon deposition or, in the discretion of the court, for temporary removal and production before the court or officer for the purpose of being orally examined, may be made upon motion, with or without notice, by a justice of the Supreme Court, or by the district court of the county in which the action is pending.

(h) *Subpoena unnecessary; when.* A person present in court, or before a judicial officer, may be required to testify in the same manner as if the person were in attendance upon a subpoena.

(Amended effective January 1, 1995.)

Advisory Committee Note. — Purposes of Amendment. The 1994 amendments represent a substantial change from prior practice. Patterned on the 1991 amendments to Fed. R. Civ. P. 45, these amendments expedite and facilitate procedures for serving subpoenas, modify procedures relating to persons who are not parties to correspond to procedures relating to parties under Utah R. Civ. P. 34, and specify the rights and obligations of persons served with a subpoena.

Paragraph (a). This paragraph amends former Rule 45 in the following important respects:

First, subparagraph (a)(6)(3) authorizes an attorney to issue and sign a subpoena as an officer of the court. The subparagraph eliminates the requirement that an attorney obtain a subpoena from the clerk of the court, and the requirement that a subpoena be issued under seal of the court. An attorney who is not a member of the Utah State Bar but who has been admitted to practice pro hac vice in the court in which the action is pending is authorized to issue a subpoena. Consistent with the authority of an attorney to issue a subpoena, subparagraph (a)(1)(B) requires every subpoena to identify the attorney serving it. Subparagraph (a)(1)(A) requires every subpoena to issue from the court in which the action is pending, amending former Rule 45(d)(1), which authorized a deposition to be issued from the court where the deposition is to take place, as well as the court where the action is pending.

Second, subparagraph (a)(2) authorizes a party to serve upon a person who is not a party a subpoena to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises. A party no longer must serve a subpoena duces tecum to discover documents or tangible things from a person who is not a party, although the

nded rule preserves that option, and no er must bring an independent action for y onto land. Subparagraph (a)(2) also re- es a person who is not a party to produce erials within that person's control, which ects that person to the same scope of dis- ry as if that person were a party served a discovery request under Rule 34

ird, subparagraph (a)(1)(D) requires every oena to state the rights and duties of a on served in a form substantially similar to form in the Appendix to these rules.

aragraph (b) also amends former Rule 45 everal important respects. Subparagraph)(A) requires prior notice of each com- ded production or inspection of documents ngible things, or inspection of premises, to served as prescribed by Rule 5(b). This aragraph ensures that other parties will notice enabling them to object to or par- ate in discovery, or to serve a demand for tional materials. No similar provision is ded for depositions, because depositions governed by Rule 30 or 31. Subparagraph)(A) specifies that the subpoena may be ed as required by Rule 4(e), amending graph (c) of the former rule.

bparagraph (b)(4) authorizes a subpoena oduction or inspection of documents or ible things or inspection of premises to be ed upon a person who is not a party at any after commencement of the action. A sub- a served upon a person who is not a party the same scope specified in Rule 34(a) for a est served upon a party, and is subject to same procedures specified in Rule 34(b). A on who is not a party is not required to file itten response to the subpoena, unless the y objects to the subpoena pursuant to sub- graph (c)(2)(D).

bparagraph (b)(4) also requires each party ng a subpoena for the production of docu- ts to provide to other parties copies of ments obtained in response to the sub- a. No comparable provision appears in the al rule, but the Committee determined such a provision would alleviate some of burden imposed upon persons who are not es and shift it to parties.

her subparagraphs make minor amend- ts to the former Rule 45. Subparagraph)(C) amends former paragraph (d)(3) to de a subpoena for document production or ection, as well as a deposition subpoena. aragraph (b)(2) is the former paragraph with minor modifications. Subparagraph)(A) requires a nonresident to attend dep- on only in the county where the nonresi- is served, amending former paragraph) to eliminate the requirement that a non- ent attend a deposition within forty miles e place of service.

ragraph (c). Paragraph (c) states the s of witnesses or other persons served with oenas. The paragraph does not diminish s conferred by any other rule or any other ority. Subparagraph (c)(1) states the duty attorney to minimize the burden on a ess who is not a party, and specifies that a witness may recover lost earnings that t from the misuse of a subpoena. Subpara- graph (c)(1) expands the responsibility of an attorney stated in Rule 26(g); this responsibil- ity is correlative to the expanded power of an attorney to issue a subpoena.

Subparagraph (c)(2)(A) specifies that a per- son who is not a party served with a subpoena for the production or inspection of documents or tangible things or inspection of premises must have at least 14 days to respond. A subpoena to appear at trial, at hearing, or at deposition must be served within a reasonable time, un- less it also requires the production of docu- ments.

Subparagraph (c)(2)(C) states that a person who is not a party has no obligation to make copies or to advance costs, and has no counter- part in either the federal rule or the former state rule. The Committee included this state- ment in the rule so that it would become part of the notice provided to each person served with a subpoena.

Subparagraph (c)(2)(D) specifies that a per- son served with a subpoena for the production or inspection of documents or tangible things or inspection of premises may serve written objec- tion upon the party serving the subpoena. The party serving the subpoena bears the burden to obtain an order to compel production, and must provide prior notice to the person served of the motion to compel. A person served with a sub- poena to appear at trial, at hearing, or at deposition, must appear unless the person ob- tains a court order to quash or modify the subpoena; a written objection to the serving party is insufficient. A person served with a subpoena duces tecum may object to providing documents by notifying the party serving the subpoena, but still must appear to testify at trial, at hearing, or at deposition, unless the person obtains an order to quash or modify the subpoena

Quash Duces Tecum

Subparagraph (c)(3) identifies the circum- stances in which a subpoena may be modified or quashed. It follows paragraph (c)(3) of the 1991 amendments to Fed. R. Civ. P. 45, but is modi- fied to specify the locations where residents or nonresidents of the State may be compelled to attend deposition

Paragraph (d). This paragraph follows the 1991 amendments to Fed R. Civ. P. 45. Sub- paragraph (d)(2)(D) applies to privileged attor- ney-client communications, and to all attorney work product protected under the doctrine of Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), and progeny.

Paragraph (e). This paragraph specifies that an adequate cause for failure to obey exists when a subpoena purports to require a party to respond at a place beyond the geographic boundaries imposed by the rule, amending former paragraph (f)

Paragraph (f). This is the former paragraph (g), amended to eliminate references to the masculine pronoun

Paragraph (g) This is the former paragraph (h).

Paragraph (h) This is the former paragraph (i), amended to eliminate references to the masculine pronoun.

Compiler's Notes. — This rule corresponds to Rule 45, F.R.C.P.

Cross-References. — Civil penalty and damages recoverable, § 78-24-7
Contempt, § 78-32-1 et seq
Definition of subpoena, § 78-24-5
Duty of witness served with subpoena, § 78-24-6
Fees and mileage of witnesses, § 21-5-4.
Municipality, rules may govern subpoena issued by, § 10-3-610

NOTES TO DECISIONS

Contempt
--Refusal to give testimony
---Denial of witness fees.
Production of documentary evidence
—Amount of material.
Service
—Mileage and attendance fees
---Distance between home and court
---Several pending cases.
--Waiver.
---Effect on witness.
Taking of deposition.
—Command to appear in notice
Cited

Contempt.

—Refusal to give testimony.

---Denial of witness fees.
Litigants who were before court and who were personally ordered to appear before notary and give testimony for depositions, but who refused to obey because witness and mileage fees were denied them in advance, although seasonably requested, were guilty of contempt, notwithstanding that court may have erred in concluding that they were not entitled to the fees. Crowther v. District Court, 93 Utah 586, 54 P.2d 243 (1936)

Production of documentary evidence.

—Amount of material.
Even though former law authorized the issuance of a subpoena duces tecum, if the number of books specified was so great as to be unreasonably burdensome to produce them all in court or before the officer, the witness might justify his failure to produce them, until such time as he or others might be examined to determine which contained relevant matter Evans v Evans, 98 Utah 189, 98 P.2d 703 (1940).

Service.

—Mileage and attendance fees.

---Distance between home and court.
Mileage was allowed subpoenaed witness for entire distance between home of witness and place where court was held, or where he was required to attend, and not merely from place where he was served with subpoena. Holt v. Nielson, 37 Utah 566, 109 P. 470 (1910).

---Several pending cases.
Witnesses subpoenaed and in actual attendance in several cases at the instance of the same plaintiff were entitled to their fees in each case, though the suits were pending at the same time and place. Smith v. Nelson, 23 Utah 512, 65 P. 485 (1901).

—Waiver.

---Effect on witness.
Witness could waive strict compliance with respect to service of subpoena and still be required to attend court, and be entitled to mileage fees from home to place of trial. Holt v. Nielson, 37 Utah 566, 109 P. 470 (1910)

Taking of deposition.

—Command to appear in notice.
To obtain presence of witness for purpose of taking his deposition, notice and affidavit prescribed by former statute had to be served on adverse party's attorney, and then if witness would not voluntarily appear, the officer before whom the deposition was to be taken had to issue subpoena for his appearance; a command to witness to appear contained in notice or affidavit would be ineffective. Olson v. District Court, 93 Utah 145, 112 A.L.R. 438 (1937).

Cited in Schultz v. Conger 755 P.2d 165 (Utah 1988)

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur 2d Witnesses §§ 5, 7, 9 to 22
C.J.S. — 97 C.J.S. Witnesses §§ 19 to 34 45
A.L.R. — Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R.3d 1373
Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R 4th 680
Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213
Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 A.L.R 4th 872
Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 A.L.R.4th 939
Requirements, under Rule 45(c) of Federal Rules of Civil Procedure and Rule 17(d) of Federal Rules of Criminal Procedure, relating to service of subpoena and tender of witness fees and mileage allowance, 77 A.L.R. Fed. 863

prejudice resulted,[16] they ordinarily do not require him to show that but for the error a different result would have obtained,[17] and it has been held that these statutes and rules cannot be invoked unless the cause preponderates so heavily on the side of the prevailing party that the error could not have contributed to or resulted in a miscarriage of justice.[18]

"Technical error" statutes or rules have been held not to necessarily affect the application of the rule that prejudice will be presumed from a showing of material error.[19]

3. General Tests of Prejudicial Effect

§ 783. Generally.

The determination whether or not a particular error is prejudicial raises many complex problems. While the rule that only prejudicial error is reversible is well recognized, there is a range for a variety of views as to its application to specific errors, and what one court may consider an error of absolutely no consequence, another court may treat as one whose prejudicial character is incapable of estimate.[20] Appellate courts generally take the view that where the right to present in full a party's view of the case, including interrogation of all witnesses, is denied, the error cannot be held to be harmless.[1] The test is said to be whether, upon a review of the record, it sufficiently appears that the rights of the complaining party have been injuriously affected by the error, or that he has suffered a miscarriage of justice.[2] The fact that

16. Santina v General Petroleum Corp. 41 Cal App 2d 74, 106 P2d 60.

17. McCarty v Gappelberg (Tex Civ App) 273 SW2d 943, 46 ALR2d 93, error ref n r e.

Such provisions may not be invoked for the purpose of declaring an erroneous admission of evidence harmless when the issue is close and the erroneous admission may have been the weight that tipped the scales against the appellant. Krulewitch v United States, 336 US 440, 93 L ed 790, 69 S Ct 716.

18. United States v River Rouge Improv. Co. 269 US 411, 70 L ed 339, 46 S Ct 144; Herbert v Lankershim, 9 Cal 2d 409, 71 P2d 220.

Under the federal harmless error statute (now Rule 52, Federal Rules of Crim Proc) an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. Thus, error in an instruction given in a criminal case in which the question of defendant's guilt was a close one cannot be regarded as harmless and so one which may be disregarded because guilt may be deduced from the whole record. Bihn v United States, 328 US 633, 90 L ed 1485, 66 S Ct 1172.

A statute which provides that reversals shall not be ordered for errors which do not affirmatively appear to have affected prejudicially the substantial rights of the party complaining, when it appears that substantial justice has been done, does not authorize the affirmance of a judgment upon the ground that it is in accordance with the view of the facts which the reviewing court itself might derive from the conflicting evidence, where it is based on a verdict rendered under the apparent influence of a materially erroneous instruction, or by a jury made up in part of persons disqualified on account of interest. Broadway Mfg. Co. v Leavenworth Terminal R. & Bridge Co 81 Kan 616, 106 P 1034.

19. The constitutional provision of the state of Arizona forbidding a reversal for technical error where on the whole record substantial justice has been done could not be properly applied by claiming that error in admitting hearsay testimony was merely "technical." Elmer v State, 20 Ariz 170, 178 P 28, 2 ALR 1519.

The "technical errors or defects" mentioned in the provision of the state's code of criminal procedure refer only to such errors or defects as do not affect a substantial right and cannot be reasonably believed to have changed the result, and despite that statutory provision, a presumption of prejudicial effect arises if it is apparent that the erroneous ruling may have affected the verdict People v Bonier, 179 NY 315, 72 NE 226.

20. Kotteakos v United States, 328 US 750, 90 L ed 1557, 66 S Ct 1239.

Invited error, see §§ 713 et seq., supra.

1. Wisdon v Stegall, 219 Miss 776, 70 So 2d 43.

2. Hays v Viscome, 122 Cal App 2d 135, 264 P2d 173, 39 ALR2d 1435; Parker v Roberts, 99 Vt 219, 131 A 21, 49 ALR 1382.

the record as it stands may show that the evidence preponderated heavily i favor of the appellee does not foreclose consideration on the part of the review ing court of any error or irregularity committed at the trial,[3] and for th purpose of determining whether or not the appellant has been injured, it proper to look to the whole record, and not to that part only which precede and includes the particular exception under consideration.[4]

§ 784. Error favorable to appellant.

If error which does not harm the party appealing is not ground for reversa it would seem, a fortiori, that no harm results from error which operates in h favor.[5] So, it has usually been held that the party is not entitled to complai where the judgment against him is for a smaller amount than should hav been awarded,[6] although the view has sometimes been taken that the part subjected to a verdict for less than the amount required by a specific instruc tion,[7] or fixed by an express contract,[8] may justifiably complain of error, an that error may lie in tort actions, where the circumstances indicate that th jury brought in a verdict for less than any amount justified by the evidence as a compromise on the issue of liability.[9]

An appellant in a criminal case may not take advantage of error in the cou below that operated to his benefit,[10] and in numerous cases it has been hel

3. Pilgeram v Haas, 118 Mont 431, 167 P2d 339.

4. Bates v Rentz, 262 Ala 681, 81 So 2d 349; Pease v Golightly, 168 Okla 582, 35 P 2d 469, 94 ALR 956; State v Britton, 27 Wash 2d 336, 178 P2d 341.

It has been held that Rule 52 of the Federal Rules of Criminal Procedure (formerly 28 USC § 391) means that a criminal appeal should not be turned into a quest for error, but does not mean that portions of a charge to the jury relied on as curing error in other portions must be read in isolation to the full charge and magnified out of all proportion to their likely importance at the trial. Bihn v United States, 328 US 633, 90 L ed 1485, 66 S Ct 1172.

It becomes our duty, whenever the question is raised, to scrutinize the entire record in each particular case, and determine whether or not the error was harmless or prejudicial. State v Reardon, 245 Minn 509, 73 NW2d 192.

Such matters as the final amount determined by the court and a remittitur required of the plaintiff must be considered in determining whether error is prejudicial. Austro-American S. S. Co. v Thomas (CA2) 248 F 231.

5. Re Monaghan's Estate, 71 Ariz 334, 227 P2d 227; Pullman Co. v Schaffner, 126 Ga 609, 55 SE 933; Miner v Western Casualty & Surety Co. 241 Iowa 530, 41 NW2d 557, 14 ALR2d 1358; Creditors' Nat. Clearing House v Bannwart, 227 Mass 579, 116 NE 886. Re Forsythe, 221 Minn 303, 22 NW2d 19, 167 ALR 1; Vaughn v Booker, 217 NC 479, 8 SE2d 603, 132 ALR 977; Cromeenes v San Pedro, L. A. & S. L. R. Co. 37 Utah 475, 109 P 10.

Where the appellant was not entitled to any damages at all, he cannot successfully complain on appeal that the court below awarded him only nominal damages. Bouquet v Hackensack Water Co. 90 NJL 203, 101 A 579.

Although an appeal from a final decree in equity brings up the whole case, one enjoined from infringing another's tradename may not complain that the decree is too favorable to him, and that it should have been rendered without geographical limitations within the United States. Cohen v Nagle, 190 Mass 4, 76 NE 276.

Application to evidence questions, see 804, infra.

6. Payne v Commercial Nat. Bank, 177 Ga 68, 169 P 1007; Johns v League, Duvall & Powell, 202 Ga 868, 45 SE2d 211, 174 ALR 757; Ullman v Bee Hive Dept. Store, 19 Wis 350, 214 NW 349, 53 ALR 281; Peterson v Johnson, 16 Wyo 473, 28 P2d 487, 9 ALR 723.

Annotation: 31 ALR 1090, s. 174 ALR 76

7. Winston v McKnab, 134 Kan 75, 4 P2 401; Tou Velle v Farm Bureau Co-op. Exchange, 112 Or 476, 229 P 83, 1103.

Annotation: 31 ALR 1099, s. 174 ALR 77

8. Jensen v Nall, 53 Colo 212, 124 P 47 Samuels v Schiller, 205 App Div 5, 199 NY 53.

Annotation: 31 ALR 1102, s. 174 ALR 78

9. Spain v Griffith, 42 Ariz 304, 25 P2 551; Gundry v Atchison, T. & [illegible] 104 Cal App 753, 286 P 718; 162 Va 572, 175 SE 230.

Annotation: 31 ALR 1106, ALR 805, 809.

10. Williams v United States,

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for a little more or a little less than it should have been will not, because of such error, be reversed or corrected.[2] The appellate courts will generally not reverse an order of the trial court that has already granted a new trial, even though it may appear to them that only nominal damages may be recovered.[3] However, there are instances where the error in the amount of the judgment, although small, has been held sufficient to require a reversal,[4] and a failure to award even nominal damages may be held reversible error where their recovery would determine and adjudicate valuable rights, as rights in real property.[5]

§ 791. Infringement on constitutional and statutory rights.

It is sometimes stated that an assignment of error must either show resulting injury to the appellant or that some of his constitutional or statutory rights have been violated, and unless one of these matters can be shown, the error is harmless.[6] Thus it is generally held to be no excuse for the violation of a mandatory rule or statute to say that no harm has resulted from the violation because of the error.[7] And an error complained of may be ground for reversing the judgment where a constitutional or statutory right has been violated, although the error may appear to be otherwise harmless.[8] But otherwise harmless error may not be changed to reversible error by reason of alleged infringement on due process if the error does not impair the essential elements of due process, which are notice and an opportunity to be heard in an orderly proceeding adapted to the nature of the case.[9] Thus, whether there has been a real infringement on the rights of the appellant is a factor in applying the principle, as where communication between the court and jury, in the absence of the defendant, has been considered harmless error if the communication was in no manner prejudicial,[10] although it has also been ruled that a statement in the prosecuting attorney's summation showing a withdrawn plea of guilty is reversible error, although the case was exceedingly strong against the defendant, since the infraction violated the due process clause of the federal and state constitutions.[11]

Error of the lower court in refusing to consider the constitutionality of a statute upon which the action was based is harmless if the statute is determined to be valid upon appeal.[12]

On the other hand, error, however substantial or prejudicial it may be, is immaterial if the cause is based on an unconstitutional statute, since there is no valid basis for the action.[13]

2. Brown v Coates, 102 App DC 300, 253 F2d 36, 67 ALR2d 943.
Annotation: 44 ALR 183.

3. Kramer v Perkins, 102 Minn 455, 113 NW 1062.

4. *Annotation:* 44 ALR 181.

5. Harvey v Mason City & Ft. D. R. Co 129 Iowa 465, 105 NW 958; Clark v Mason, 264 Ky 683, 95 SW2d 292.

6. Pease v Golightly, 168 Okla 582, 35 P2d 469, 94 ALR 956.

7. Poultryland, Inc. v Anderson, 200 Ga 549, 37 SE2d 785; Ferderer v Northern Pac R. Co. 75 ND 139, 26 NW2d 236.

8. Chicago, R. I. & P. R. Co v Waldo, 90 Okla 185, 216 P 911, 32 ALR 638.
Where the demurrer to a complaint in an equitable action is sustained and the plaintiff is allowed to plead over in a legal action, it is reversible error to deny either party a trial by jury, although the court was seeking to dispose of the issues justly and in such manner as to avoid a multiplicity of suits. Pugh v Tidwell, 52 NM 386, 199 P2d 1001.

9. Chicago Land Clearance Com v Darrow, 12 Ill 2d 365, 146 NE2d 1, 68 ALR2d 532.

10. State v Schifsky, 243 Minn 533, 69 NW2d 89

11. State v Reardon, 245 Minn 509, 73 NW2d 192.

12. Porter v Charleston & S. R. SC 169, 41 SE 108.

13. Minnear v Minnear, 131 Colo 31 P2d 517.

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791

brief on appeal, but not for fees payable to clerk. Salt Lake City v. Robinson, 39 Utah 260, 116 P. 442, 35 L.R.A. (n.s.) 610, 1913E Ann. Cas. 61 (1911).

Prisoners.

Section 64-13-23(5), directing a court to determine the amount of a prisoner's funds available for payment of filing fees and costs, and placing limitations on the amounts that may be assessed, does not conflict with statutory provisions regarding filings by impecunious litigants. Hansen v. Wilkinson, 889 P.2d 927 (Utah Ct. App. 1995).

21-7-3. Impecunious litigants — Affidavit.

(1) For purposes of this section:

(a) "Convicted" means a conviction by entry of a plea of guilty or nolo contendere, guilty and mentally ill, no contest, and conviction of any crime or offense.

(b) "Prisoner" means a person who has been convicted of a crime and is incarcerated for that crime or is being held in custody for trial or sentencing.

(2) As provided in this chapter, any person may institute, prosecute, defend, and appeal any cause in any court in this state without prepayment of fees and costs or security, by taking and subscribing, before any officer authorized to administer an oath, an affidavit of impecuniosity demonstrating financial inability to pay fees and costs or give security.

(3) The affidavit shall contain complete information on the party's:

(a) identity and residence;

(b) amount of income, including government financial support, alimony, child support;

(c) assets owned, including real and personal property;

(d) business interests;

(e) accounts receivable;

(f) securities, checking and savings account balances;

(g) debts; and

(h) monthly expenses.

(4) If the party is a prisoner, he shall also disclose the amount of money held in his prisoner trust account at the time the affidavit is executed as provided in Section 21-7-4.5.

(5) In addition to the financial disclosures, the affidavit shall state the following:

I, A B, do solemnly swear or affirm that due to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence or the appeal which I am about to take, and that I believe I am entitled to the relief sought by the action, legal proceedings, or appeal.

History: R.S. 1898 & C.L. 1907, § 1017; C.L. 1917, § 2577; R.S. 1933 & C. 1943, 28-7-3; 1996, ch. 161, § 1.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, rewrote this section.

Cross-References. — Indigent defense act, Title 77, Chapter 32.

Courts to be open at all times, Utah Const., Art. I, Sec. 11

Right of appeal guaranteed, Utah C... VIII, Sec. 5

Witnesses called at state expense f... nious criminal defendants, § 21-5-14

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NOTES TO DECISIONS

ANALYSIS

Constitutionality.

This section is constitutional. Eddington v. Union Portland Cement Co., 42 Utah 274, 130 P. 243 (1913).

Appeal fees.

An impecunious criminal defendant does not lose the constitutional right to appeal a conviction as a result of his inability to pay filing fees. State v. Johnson, 700 P.2d 1125 (Utah 1985).

Brief on appeal.

If one appealing from conviction does not show himself unable to pay costs by reason of his impecuniosity, he is liable for costs of printing appellate brief but not for fees payable to clerk. Salt Lake City v. Robinson, 39 Utah 260, 116 P. 442, 35 L.R.A. (n.s.) 610, 1913E Ann. Cas. 61 (1911).

Construction and application.

All that was contained in R.S. 1898, §§ 1016 to 1019 (now §§ 21-7-2 to 21-7-4, 21-7-6) relating to the matter of costs was held to be there by authority of the Legislature. Whatever change of phraseology or omission of words there might have been between those sections as they then stood and the original acts from which they were taken was clearly authorized by Laws 1896, ch. 85, § 4. Moreover, even if that were insufficient, the matter was nevertheless settled by Laws, 1899, ch. 7, in which R.S. 1898, as printed, was approved and adopted by a special legislative act. Eddington v. Union Portland Cement Co., 42 Utah 274, 130 P. 243 (1913).

Indigency.

In determining whether a particular defendant is indigent, the trial court must consider the defendant's entire financial situation, balancing assets against liabilities and income against living expenses. Several factors are considered in determining whether petitioner is impecunious, such as: petitioner's employment status and earning capacity; financial aid from family or friends; financial assistance from state and federal programs; petitioner's necessary living expenses and liabilities; petitioner's unencumbered assets, or any disposition thereof, and petitioner's borrowing capacity; and the relative amount of court costs to be waived. State v. Vincent, 845 P.2d 254 (Utah Ct. App. 1992).

Joint appeal.

Where a joint appeal, and not a joint and several appeal, is taken by several defendants from a joint judgment, and upon a joint rather than a joint and several assignment of errors, and appeal is not perfected by all of them, either by all giving or executing a joint or a separate undertaking, unless waived or all filing an affidavit of impecuniosity, appeal must be dismissed, the filing of an affidavit of impecuniosity by only one of the appellants being insufficient. Johnston v. Geary, 84 Utah 47, 33 P.2d 757 (1934).

Jury fees.

Defendant requesting jury trial is not required to advance jury fees, in order to be entitled to such trial, if defendant files affidavit of impecuniosity. Toltec Ranch Co. v. Babcock, 24 Utah 183, 66 P. 876 (1901), aff'd, 191 U.S. 542, 48 L. Ed. 294, 24 S. Ct. 169 (1903).

Prisoners.

Section 64-13-23(5), directing a court to determine the amount of a prisoner's funds available for payment of filing fees and costs, and placing limitations on the amounts that may be assessed, does not conflict with statutory provisions regarding filings by impecunious litigants. Hansen v. Wilkinson, 889 P.2d 927 (Utah Ct. App. 1995).

Receivers.

When receiver appeals, he must either comply with this section by filing the affidavit prescribed hereby or file an undertaking. Buttrey v. Guaranteed Secs. Co., 78 Utah 39, 300 P. 1040 (1931).

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Costs §§ 47 to 51.

C.J.S. — 20 C.J.S Costs §§ 87 to 93; 24 C.J.S. Criminal Law §§ 1738 to 1758.

A.L.R. — Marital action, right of indigent to proceed without payment of costs, 52 A.L.R.3d 844.

Determination of indigency of accused entitling him to transcript or similar record for purposes of appeal, 66 A.L.R.3d 954.

Robert Flynn, III
1265 N. Carbonville Rd. #24
Price, Ut. 84501
DEFENDANT (PRO SE)
UTAH APPEAL NUMBER:

IN THE SEVENTH DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

TIRE KING INC., Plaintiff/Appellee VS. ROBERT FLYNN, III, Defendant/Appellant.	AFFIDAVIT OF IMPECUNIOSITY CASE NO: 000700120

The Defendant (Pro Se) in the above entitled case, appealed to The Utah Court of Appeals, submit the attached Affidavit of Impecuniosity for my Apeal, to go to the Utah Court of Appeal.

Executed This 21st day of February, 2001

Robert Flynn III
DEFENDANT (PRO SE)

#11(AFF. DAVIT)

[redacted]

Robert Flynn, III
1265 N. Carbonville Rd. #24
Price, UT. 84501
DEFENDANT (PRO SE)

AFFIDAVIT OF IMPECUNIOSITY

I, ROBERT FLYNN, III, do solemnly swear that owing to my low income(poverty) based solely on Social Security Disability Payments, am unable to bear the expenses of the appeal which I am about to take, and that I believe that I am entitled to the relief sought by such an appeal.

Subscribed to and Sworn
before me this day, on
February 21, 2001

Robert F Flynn III
AFFIANT

Robert F Flynn III

IN THE COUNTY OF CARBON, STATE OF UTAH, ON THIS 21ST DAY OF FEBRUARY 2001, BEFORE ME, THE UNDERSIGNED NOTARY, PERSONALLY APPEARED ROBERT FLYNN,III WHO PROVED TO ME HIS IDENTITY THROUGH DOCUMENTARY EVIDENCE IN THE FORM OF A UTAH DRIVERS LICENSE #151553146, TO BE THE PERSON WHO SIGNED THE PRECEDING DOCUMENT IN MY PRESENCE AND WHO SWORE OR AFFIRMED TO ME THAT THE SIGNATURE IS VOLUNTARY AND THE DOCUMENT TRUTHFUL.

Connie Case
NOTARY SIGNATURE AND SEAL

CONNIE CASE
NOTARY PUBLIC • STATE of UTAH
120 EAST MAIN
PRICE, UT 84501
COMM. EXP. 9-28-2003

IN THE UTAH SUPREME COURT

TIRE KING INC, Plaintiff and Appellee, vs. ROBERT FLYNN III, Defendant and Appellant.	**AFFIDAVIT OF IMPECUNIOSITY** Case No. 20010172-SC

Petitioner robert flynn iii ("Affiant") provides the following information as required by Utah Code Section 21-7-3: Supplemental to timely filed affidavit

AFFIANT:

Name: ROBERT FLYNN III (SSN 475 46 8855)

Address (If inmate, include prison site): 1265 N. CARBONVILLE RD #24 PRICE UTAH 84501

Telephone: NONE

AFFIANT'S FINANCIAL INFORMATION

Fill out the following table completely.

	Monthly Net Income	Monthly Gross Income
Employer's Name & Address: NONE	0	0
Alimony received: NONE	0	0
Child Support received: NONE	0	0
* Income in the past 12 months from any other non-governmental source including business, profession or other self-employment, rent payments; interest or dividends; pensions, annuities, or life insurance payments; gifts or inheritance: 17.5K inher.(all used in 2000 move/repairs)		0
Income from government financial support including social security benefits, AFDC, worker's compensation, veterans noneducational benefits, housing, food, or other living allowances paid to members of the military, clergy, and others: SSD		1200.00/m

*had to move to meet codes: Not cost effective to upgrade my

f Affiant is currently not employed: Disability $625.00 in 1980

Date & state of last employment last 1980 Supr. Schools LA County

Salary/wages per month when last employed $ 2500.00/mo 1979

Amounts in cash or in any bank accounts including savings and checking	0
Amounts owing to Affiant including accounts receivable	0

ist of home, land or other real property and vehicles or other personal property owned in whole or in part by Affiant, its location and its approximate value.

Property	Location	Value
Purchase/Repair of 1978 used mobile home 2000	#24 Price Ut 84501	purchase $ 11.5K est.
1979 corvette Prev. Primary veh.	same	9.0K est
3 misc. older cars (1 working)	same	3.0K est.

ist of Affiant's del ..

To whom owed	Amount	To whom owed	Amount
~~Dr Winkel~~		noncurrent visa card(1999 on)	-1000.00
Central Park	-15.0K est left		
(*8yrs fin.) in 2000	(-10.0K) down and in repair to move in		

ist of Affiant's monthly expenses.

	Amount		Amount		Amount
Food var....	to 350.00	Gas	125.00	Other (list)	
Clothing	50.00	Water	30.00	Space	190.00
Transportation	100.00	Sewer	5.00	past visa	50.00
Mortgage/rent	(*)146.00	Car Payments	0.00	ins/car home	100.00
Electricity	45.00	Medical/Dental Payments Bills	80.00	Rxs	50.00

the prayer does not limit the relief which the court may grant. Behrens v. Raleigh Hills Hosp., 675 P.2d 1179 (Utah 1983).

—New trial.

——Particularization.

Only purpose for requiring particularization of grounds for motion for new trial is to inform court and other party of theories upon which new trial is sought; where defendant filed affidavit with motions setting forth theories, and judgment had been on pleadings, court and parties were sufficiently advised as to grounds for motion. Howard v. Howard, 11 Utah 2d 149, 356 P.2d 275 (1960).

—Setting aside conditional order.

Where court on own initiative lowered from $2,000 to $1,000 value of building as found by jury and entered conditional order granting new trial unless plaintiff consented to reduction, court could restore jury findings under authority of this Rule, since plaintiff filed motion to set aside conditional order for new trial within ten days. National Farmers' Union Property & Cas. Co. v. Thompson, 4 Utah 2d 7, 286 P.2d 249, 61 A.L.R.2d 635 (1955).

Orders.

—Correction.

Where judge made perfunctory or clerical mistake resulting from erroneous assumption that order prepared by counsel correctly reflected judgment of Supreme Court and trial court, judge could correct order on his own motion. Meagher v. Equity Oil Co., 5 Utah 2d 196, 299 P.2d 827 (1956).

Cited in Boskovich v. Utah Constr. Co., 123 Utah 387, 259 P.2d 885 (1953); Thomas v. Heirs of Braffet, 6 Utah 2d 57, 305 P.2d 507 (1956).

COLLATERAL REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d Motions, Rules, and Orders § 1 et seq.; 61A Am. Jur. 2d Pleading §§ 31 et seq., 665.

C.J.S. — 60 C.J.S. Motions and Orders § 1 et seq.; 71 C.J.S. Pleading §§ 63 to 210, 140 et seq., 211 et seq.

A.L.R. — Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Rule 8. General rules of pleadings.

(a) *Claims for relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses; form of denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

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Am. Jur 2d — 50 Am Jur 2d Larceny § 2
C J S — 52A C J S Larceny § 1(3)
A L R — Larceny entrapment or consent 10 A L R 3d 1121

Criminal offenses in connection with rental of motor vehicles 38 A L R 3d 949

Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin operated machine 45 A L R 3d 1286

Changing of price tags by patron in self service store as criminal offense 60 A L R 3d 1293

Embezzlement larceny false pretenses or allied criminal fraud by partner 82 A L R 3d 822

Criminal liability for theft of interference with or unauthorized use of computer programs files or systems 51 A L R 4th 971

Participation in larceny or theft as precluding conviction for receiving or concealing the stolen property 29 A L R 5th 59

76-6-404.5. Wrongful appropriation — Penalties.

(1) A person commits wrongful appropriation if he obtains or exercises unauthorized control over the property of another, without the consent of the owner or legal custodian and with intent to temporarily appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property

(2) The consent of the owner or legal custodian of the property to its control by the actor is not presumed or implied because of the owner's or legal custodian's consent on a previous occasion to the control of the property by any person

(3) Wrongful appropriation is punishable one degree lower than theft, as provided in Section 76-6-412, so that a violation which would have been

(a) a second degree felony under Section 76 6-412 if it had been theft is a third degree felony if it is wrongful appropriation,

(b) a third degree felony under Section 76 6 412 if it had been theft is a class A misdemeanor if it is wrongful appropriation,

(c) a class A misdemeanor under Section 76 6-412 if it had been theft is a class B misdemeanor if it is wrongful appropriation, and

(d) a class B misdemeanor under Section 76 6 412 if it had been theft is a class C misdemeanor if it is wrongful appropriation

History C 1953, 76-6-404 5, enacted by L 1998, ch 138, § 1, 1999, ch 21, § 100

Amendment Notes — The 1999 amendment effective May 3 1999 deleted former Subsection (3)(e) which read "an act of unauthorized control of motor vehicles trailers or semitrailers which does not constitute theft is punishable under Section 41 1a 1311 " making a related change

Effective Dates — Laws 1998 ch 138 became effective on May 4 1998 pursuant to Utah Const Art VI Sec 25

76-6-405. Theft by deception.

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof

(2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed "Puffing" means an exaggerated commendation of wares or worth in communications addresse the public or to a class or group

History C 1953 76 6-405, enacted by L 1973, ch 196, § 76 6 405

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